

California High-Speed Train Project



Agreement No.: _____

GENERAL PROVISIONS

DRAFT – [05/19/2014]

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1. DEFINITIONS

Capitalized terms (unless otherwise indicated in this Article 1) used in the Contract without definition shall have the meaning ascribed to them in this Article 1. Certain additional capitalized terms are defined elsewhere in the Contract. "Adverse Rights" means liens and encumbrances, security interests, contractual rights (e.g., those under debt instruments or leases), and all other rights of third-parties of every kind and description including, without limitation, any creditors of Contractor.

"Affiliate" means

- (a) Any Person that directly or indirectly through one or more intermediaries controls, or is controlled by, or is under common control with, Contractor or any of its members, partners or shareholders holding a 10 percent or greater interest in Contractor;
- (b) Any Person for which 10 percent or more of the equity interest in such Person is held directly or indirectly, beneficially or of record by:
 - (i) Contractor,
 - (ii) Any of Contractor's members, partners or 10 percent or greater shareholders or
 - (iii) Any Affiliate of Contractor under part (a) of this definition; and
- (c) Subcontractor affiliates determined using the definition in "a" and "b" above, but substituting the term "Subcontractor" for "Contractor."

For the purposes of this definition, the term "control" means the possession, directly or indirectly, of the power to cause the direction of the management of a Person, whether through voting securities, by contract, family relationship or otherwise. In the context of impartiality of DRB members, the term "Affiliate" shall also mean local agencies that are represented on the Owner's board.

"Allowable Uses" has the meaning given to it in Article 25.2.

"Amtrak" means the National Railroad Passenger Corporation, which has its headquarters at 60 Massachusetts Avenue, NE, Washington, DC 20002, and any permitted assignee of Amtrak's rights under the Amtrak Contract.

"Amtrak Contract" means the contract for the supply of trainsets between Contractor and Amtrak resulting from the Request for Proposals.

"Applicable Laws" means all current applicable federal, state and local laws, codes, ordinances, rules, regulations, judgments, decrees, directives, guidelines, policy requirements, orders or other governmental restrictions (including those resulting from the initiative or referendum process) of Owner or any Governmental Person, each as may be amended and in each case including successor provisions. For the avoidance of doubt, "Applicable Laws" includes any applicable Rules of Particular Applicability issued by the FRA. "Applicable Laws" does not include Governmental Approvals.

"Baseline Fleet Mileage Schedule" means [To be provided]

"Baseline Program" means the program by this name described in Article 4.4.



“Breach Notice” has the meaning given to it in Article 25.5(a).

“Capital Spare” means an item that is not required for normal maintenance, but may be required to restore equipment after an unusual event and (a) can only be economically produced as part of a production run or (b) there is a long lead time for delivery of its replacement. The Capital Spares are listed in Attachment H to the Signature Document.

“Certificate of Acceptance” shall mean any of the certificates issued by Owner described in Article 9.

“Certificate of Acceptance for Baseline Program and PMP” means the Certificate of Acceptance issued by Owner to Contractor pursuant to Article 9.2.

“Certificate of Acceptance for Driving Simulator” means the Certificate of Acceptance issued by Owner to Contractor pursuant to Article 9.3.

“Certificate of Acceptance for Maintenance and Training Program and the Maintenance Plan” means the Certificate of Acceptance issued by Owner to Contractor pursuant to Article 9.4.

“Certificate of Acceptance for Preliminary Submittals” means the Certificate of Acceptance issued by Owner to Contractor pursuant to Article 9.1.

“Certificate of Conditional Acceptance” means the Certificate of Acceptance issued by Owner to Contractor pursuant to Article 9.6.

“Certificate of Final Acceptance” means the Certificate of Acceptance issued by Owner to Contractor pursuant to Article 9.7.

“Certificate of Fleet Acceptance” means the Certificate of Acceptance issued by Owner to Contractor pursuant to Article 9.9.

“Certificate of Owner-Owned Spares Acceptance” means the Certificate of Acceptance issued by Owner to Contractor pursuant to Article 9.8.

“Certificate of Provisional Acceptance” means the Certificate of Acceptance issued by Owner to Contractor pursuant to Article 9.5.

“Certificate of Special Tools Acceptance” means the Certificate of Acceptance issued by Owner to Contractor pursuant to Article 9.10.

“Change Order” means a Contract Modification executed by the Parties in accordance with Article 14.

“Change Order Proposal” means the document described in Article 14.6.2, which Contractor shall prepare and submit to Owner as part of the Change Order process.

“Claim” has the meaning given to it in Article 28.

“Close Date” means the date that all proposals in response to the Request for Proposal for the Provision of Tier III Next Generation Trainsets and Other Related Goods and Services must be received by Amtrak and Owner.

“Configuration Management” means a traceable and well documented process for managing, controlling and properly documenting and recording approved designs and technical data and changes thereto.



“Configuration Management Plan” means the plan by this name developed pursuant to Article 19.

“Conflict of Interest” means that because of activities or relationships with other persons or entities, (1) a person or entity is unable to render impartial assistance or advice to Owner, (2) the person’s or entity’s objectivity in performing the Work is or might be otherwise impaired, or (3) the person or entity has, or attempts to create, an unfair competitive advantage.

“Consumable Spares” means items that are designed to be discarded when worn, on reaching a predetermined condition, routinely or on failure.

“Contract” means the entire agreement between Owner and Contractor and supersedes all previous negotiations, representations, understandings and agreements, either written or oral, with respect to the subject matter hereof, and includes the documents listed in Article 2.1, including all attachments, schedules, exhibits and appendices thereto.

“Contract Amount” means the total payment for the Work, which consists of Milestone Contract Amount(s), Trainset Incremental Service Payments, Mileage Incremental Service Payments and the Manufacturing Restart Payment.

“Contract Modification” means any document, including Change Orders, executed by Owner and Contractor after the Contract is executed, that revises the Contract.

“Contract Time” means the period of time allotted in the Contract for Contractor’s completion of the Work or a portion thereof, as applicable, including, but not limited to, the Trainset Acceptance Deadline.

“Contractor” means the entity identified as the “Contractor” in the Signature Document.

“Contractor-Related Entities” means Contractor, entities forming Contractor (e.g., joint venture members), Subcontractors, their employees, agents and officers and all other Persons for whom Contractor may be legally or contractually responsible.

“Contractor Representative” means the individual authorized to make decisions and bind Contractor on matters relating to the Contract, as described in Article 39.

“Core Systems” has the meaning given to it in Section 3.2 of the Performance Specification.

“Critical Path” means the sequence of activities yielding the longest path in a critical path method (CPM) schedule.

“Cure Period” has the meaning given to it in Article 25.5(a).

“day” means a calendar day unless otherwise noted.

“Delay” means any unanticipated event, action, force or factor during the performance of the Work, which extends Contractor’s time of performance of any activity on the Critical Path. The term “Delay” is intended to cover all such events, actions, forces or factors, whether styled “delay”, “disruption”, “interference”, “impedance”, “hindrance”, or otherwise, which are beyond the control of and not caused by Contractor or any Contractor-Related Entity.



“Deliverable” means any tangible or intangible item or object produced as a result of the Work and required to be provided to Owner under the Contract.

“Design Review Process” has the meaning given to it in Section 3.2 of the Performance Specification.

“Directive Letter” means the letter by this name, described in Article 14.2.

“Discriminatory Change” means any change in Applicable Law during the term of the Contract that is principally directed at and the effect of which is principally borne by Contractor or operators of high-speed passenger rail in the State, except where such change (a) is in response, in whole or in part, to any failure to perform or breach of the Contract, violation of Applicable Law or Governmental Approval, culpable act or culpable omission on the part of any Contractor-Related Entity, (b) is a directive by the U.S. Department of Homeland Security or comparable state agency, unless such directive is directed solely at or solely affects the Work and requires specific changes in Contractor's normal design or manufacturing procedures in order to comply, or (c) is otherwise expressly permitted under the Contract.

“Disputes Review Board” or “DRB” means the board described in Article 29.

“Driving Simulator” means [To be provided]

“Equipment” has the meaning given to it in Section 3.2 of the Performance Specification.

“Escrow Agreement” has the meaning given to it in Article 25.4.

“Escrow Materials” has the meaning given to it in Article 25.4.

“Extended Cure Period” has the meaning given to it in Article 25.5(a).

“Facility” or “Facilities” as used herein means the facilities for service, inspection, periodic maintenance and/or repair.

“Failure” has the meaning given to it in Section 3.2 of the Performance Specification.

“Final Payment” means the final installment of the Contract Amount payable in connection with the Work.

“Fleet” means any of Fleets 1, Fleet 2, Fleet 3, Fleet 4, Fleet 5, or Fleet 6 as applicable.

“Fleet 1” means the two Prototype Trainsets that comprise the initial order of Trainsets under this Contract, as described in Article 3 of the Signature Document.

“Fleet 2” means the Trainsets in the second order of Trainsets described in Article 3 of the Signature Document.

“Fleet 3” means the Trainsets in the third order of Trainsets described in Article 3 of the Signature Document.

“Fleet 4” means the Trainsets in the fourth order of Trainsets described in Article 3 of the Signature Document.



“Fleet 5” means the Trainsets in the fifth order of Trainsets described in Article 3 of the Signature Document.

“Fleet 6” means the Trainsets in the sixth order of Trainsets described in Article 3 of the Signature Document.

“Fleet Acceptance” means all of the conditions in Article 9.9 have been met for a Fleet and Owner has issued a Certificate of Fleet Acceptance for that Fleet.

“Force Majeure Event” means one of the following events, to the extent the event is beyond the control of the affected Party, not due to an act or omission of the Party, materially and adversely affects the Party’s ability to meet its obligations under the Contract, the event (or the effects of which event) could not have been avoided or prevented by due diligence and use of reasonable efforts by the Party: (a) war (including civil war and revolution), invasion, armed conflict, violent act of foreign enemy, military or armed blockade, or military or armed takeover of the Work; (b) embargoes instituted by a Governmental Person; (c) any act of riot, insurrection, civil commotion or sabotage that causes direct physical damage to the Work; (d) nuclear explosion, radioactive or chemical contamination of the Work site, unless the source of the explosion, contamination, radiation or contaminated material is brought to or near the Site by the Party; (e) fire, explosion, earthquake, floods and landslides caused by natural events, or tidal wave; (f) terrorism; (g) any governor-declared emergency within the limits of the Work site; or (h) any lawsuit seeking to restrain, enjoin, challenge or delay the Work or the granting or renewal of any Governmental Approval of the Project. Notwithstanding the foregoing, the term “Force Majeure Event” shall not include normal weather, Owner-Directed Changes or any other matter for which the Contract specifies how liability or risk is to be allocated between the Parties, regardless of whether such matter is beyond the claiming Party’s control.

“FRA” means the Federal Railroad Administration.

“General Provisions” means these terms and conditions, including all schedules hereto.

“Good Industry Practice” means the exercise of the degree of skill, diligence, prudence, and foresight which would reasonably and ordinarily be expected from time to time from a skilled and experienced designer, engineer, or manufacturer seeking in good faith to comply with its contractual obligations, complying with all Applicable Laws and Governmental Approvals and engaged in the same type of undertaking under similar circumstances and conditions.

“Governmental Approval” means any approval, authorization, certification, consent, decision, exemption, filing, license, lease permit, agreement, concession, grant, franchise, registration, or ruling, required by or with any Governmental Person, in order to perform the Work (including any supplemental documents or amendments thereto).

“Governmental Person” means any federal, state, local or foreign government and any political subdivision or any governmental, quasi-governmental, judicial, public or statutory instrumentality, administrative agency, authority, body or entity. The term includes the State of California and agencies and subdivisions thereof, other than Owner.

“Guarantor” means the entity(ies) that is the obligor under a guaranty in favor of Owner related to any portion of Contractor’s performance of the Work and which are identified as a “Guarantor” in the Signature Document.



“Indemnified Parties” means Owner, Amtrak, and their respective officers, directors, employees, agents, servants, representatives, consultants, successors, assigns and subsidiaries.

“Initial Operating Segment” or “IOS” means the initial intercity operations of Owner.

“Intellectual Property” has the meaning given to it in Article 25.

“Late Trips” has the meaning given to it in Section 3 of the Performance Standards.

“Maintainer” means the entity retained by Owner to maintain the equipment provided by Contractor under the Contract.

“Maintenance Facilities” means those facilities provided by Owner for the purpose of stabling, inspecting and maintaining the equipment provided by Contractor under the Contract.

“Maintenance Management Information System” (MMIS) means a stand-alone web-based asset control and maintenance management system as described in Section 12.3.45 of the Performance Specifications.

“Maintenance Plan” means the plan by this name developed pursuant to Article 19. “Maintenance Training Plan” means the plan by this name developed pursuant to Article 19.

“Maintenance Training Program” means [To be provided].

“Manufacturing Drawings” means all drawings produced by Contractor or any Contractor-Related Entity to a degree sufficient to manufacture the Work. Such designs exclude standard off-the-shelf components.

“Manufacturing Restart Payment” means the payment by this name set forth in Attachment B to the Signature Document, covering Contractor’s costs to restart the manufacturing process.

“Mean Time between Service Interruption” or “MTBSI” has the meaning given to it in Section 6.1.1 of the Performance Specification.

“Mileage Incremental Service Payment” means the payment by this name set forth in Attachment B to the Signature Document.

“Milestone” means a discrete portion of the Work identified in Schedule 3-A or Schedule 3-B, as applicable.

“Milestone Contract Amount” means, for Fleet 1 and Fleet 2, the amount identified as “Milestone Contract Amount” in Attachment B to the Signature Document and, for Fleets 3-6, the amount determined by multiplying the Options Unit Price for the applicable Fleet by the number of Trainsets Owner has ordered for that Fleet.

“Milestone Payment” means the amounts payable to Contractor upon achievement of a Milestone, as described in Article 10.2.

“Milestone Payment Percentage” means the percentage assigned to a Milestone in the “Milestone Payment Percentage” column in Schedule 3-A or Schedule 3-B, as applicable.



“Missed Trips” has the meaning given to it in Section 2 of the Performance Standards.

“Mission Quality” has the meaning given to it in Schedule 6 to the General Provisions.

“Mission Quality Failure” has the meaning given to it in Schedule 6 to the General Provisions.

“Mission Timekeeping” has the meaning given to it in Schedule 6 to the General Provisions.

“Modification Program” has the meaning given to it in Article 12.6.

“Notice to Proceed” or “NTP” means a notice issued by Owner to Contractor authorizing Contractor to begin performance of the portion of the Work with respect to a Fleet(s) covered by the notice.

“Operation Plan” means the plan by this name developed pursuant to Article 19.

“Operator Procedures” means the plan by this name developed pursuant to Article 19. “Operator Training Plan” means the plan by this name developed pursuant to Article 19. “Options Unit Price” means the Trainset unit prices bid by Contractor for a Trainset Contractor delivers as part of Fleet 3, Fleet 4, Fleet 5 or Fleet 6, as applicable, which amounts are set forth next to the relevant Fleet under the title “Options Unit Price” in Attachment B to the Signature Document.

“Overall Trainset Service Period” means the period of time while any Trainset from Fleets 1 through 6 remains in the Trainset Service Period. The number of Trainsets within the Overall Trainset Service period will vary as the Trainset Service Periods for individual Trainsets either commence or terminate.

“Owner” means the California High-Speed Rail Authority, which has its headquarters at 770 L Street, Suite 800, Sacramento, CA 95814.

“Owner Delay” means unavoidable Delays arising from the following matters and no others:

- (a) Uncovering, removing and restoring Work, to the extent provided in Article 8.8.
- (b) Owner’s failure to provide responses to proposed schedules, design submittals or other submittals and matters for which response by Owner is required within the time periods indicated in the Contract.
- (c) Owner’s failure or inability to provide Contractor with access to the Test Track and / or Maintenance Facilities by the deadline for such access in Article 12 of the Signature Document.

“Owner-Directed Change” means an alteration or change in the Work authorized by Owner pursuant to Article 14.3.1.

“Owner-Owned Spares” means the Capital Spares and certain Unscheduled Spares that are listed as “Owner-Owned Spares” in Attachment H to the Signature Document.



“Owner Representative” means the individual authorized to make decisions and bind Owner on matters relating to the Contract, as described in Article 39.

“Party” means Owner or Contractor, as the context may require. “Parties” means Owner and Contractor, collectively.

“Performance Specification” means the Tier III Next Generation Amtrak/Authority Trainsets Performance Specification attached to the General Provisions as Schedule 1, Part A.

“Performance Standards” means the minimum standards of performance for Contractor set forth in Schedule 6.

“Person” means any individual, corporation, company, joint venture, partnership, trust, unincorporated organization or Governmental Person, including Owner.

“Preliminary Notice” means the written notice issued by Owner ahead of issuing an NTP, as described in Article 5.2.

“Price Adjust Date” means the date used for setting the indices referenced in Schedule 4 to the General Provisions.

“Principal Design Unit” means a significant and self-contained element of design work for a Trainset, such as Trainset structural integrity, traction equipment and braking systems.

“Project” means the Work product, services, warranties and other actions Contractor has agreed to provide pursuant to the terms of the Contract.

“Project Management Plan” or “PMP” means a tiered management plan developed pursuant to Article 19 that includes management tools, processes, and procedures and details how Contractor will plan, execute and control the Work.

“Proposal” means the proposal submitted by Contractor in response to the RFP, including any revisions thereto prior to Contract execution. If the RFP requested submittal of best and final offers, the term means the best and final offer submitted by Contractor, including any revisions thereto prior to Contract execution.

“Proposal Commitments” means those commitments made by Contractor in its Proposal and included in the Contract as Attachment C to the Signature Document.

“Prototype Testing” has the meaning given to it in Section 10 of Schedule 2 to the General Provisions.

“Prototype Trainsets” means the two Trainsets Contractor is required to design and manufacture for Owner, and which constitute the two Trainsets to be delivered by Contractor under Fleet 1.

“Quality Plan” means the plan by this name developed pursuant to Article 19.

“Release Condition” has the meaning given to it in Article 25.5.

“Release Notice” has the meaning given to it in Article 25.5.

“Reliability” has the meaning given to it in Section 3.2 of the Performance Specification.



“Remanufacturing Program” has the meaning given to it in Article 12.9.

“Request for Proposals” or “RFP” has the meaning set forth in the Signature Document.

“Safety Critical” as applied to a function, a system or any portion thereof, means the correct performance of which is essential to safety of personnel or equipment, or both; or the incorrect performance of which could cause a hazardous condition, or allow a hazardous condition which was intended to be prevented by the function or system to exist.

“Safety Plan” means the plan by this name developed pursuant to Article 19.

“Scheduled Spares” means spare parts that are identified as being scheduled to be replaced in the Maintenance Plan.

“Service Plan” means the plan by this name developed pursuant to Article 19.

“Signature Document” means [To be provided].

“Site(s)” means any location where Contractor or any Contractor-Related Entity performs the Work, including, but not limited to, locations where Contractor performs design, manufacturing, assembly, testing and administrative activities related to the Work.

“Spares” means Capital Spares, Consumable Spares, Scheduled Spares, Owner-Owned Spares, Unscheduled Spares and Warranty Spares.

“Special Tool(s)” means each item of special equipment, tooling, software and other materials that is particular to Contractor’s product and is required for inspecting, testing, maintaining, overhauling, servicing or repairing of the Trainsets, Vehicles, Spares and software for use in ground-based systems for diagnosing and condition-monitoring of the Trainsets, Vehicles and Spares. Such Special Tools shall form part of Contractor’s Maintenance Plan.

“State” means the State of California.

“Subcontract” means any subcontract to perform any part of the Work or provide any materials, equipment or supplies for any part of the Work between Contractor and a Subcontractor, or between any Subcontractor and its lower tier Subcontractor, at any tier.

“Subcontractor” means any Person with whom Contractor has entered into any Subcontract and any other Person with whom any Subcontractor has further subcontracted any part of the Work, at any tier.

“Subcontractor Intellectual Property” has the meaning given to it in Article 25.2.

“Submittal and Design Review Program” means the plan by this name developed pursuant to Article 19.

“System” has the meaning given to it in Section 3.2 of the Performance Specification.

“Technical Documentation” means all engineering drawings, descriptive test, engineering analysis, processes, specifications, instructions, manuals, software designs and documentation, software listings, etc. necessary to fully describe, operate, maintain and repair the Work.

“Terminal Maintenance and Storage Facility” or “TMSF” means [To be provided].



"Termination Expenses" has the meaning given to it in Article 16.2.

"Test Track" means the portion of Owner's high speed track provided by Owner to Contractor for the testing of the Trainsets at speeds up to 242 miles per hour. At a minimum, the Test Track will include an overhead catenary system.

"Testing and Commissioning Program" means the program developed pursuant to Article 19.

"Time and Materials Change Order" has the meaning given to it in Article 14.13.

"Timetable" means [To be provided].

"Trainset" has the meaning given to it in Section 3.2 of the Performance Specification. The term "Trainset" includes Prototype Trainsets.

"Trainset Acceptance Deadline" means, with respect to a Fleet, the deadline set forth in Article 4 of the Signature Document for Contractor to receive a Certificate of Final Acceptance for each Trainset within the Fleet.

"Trainset Exhibit" has the meaning given to it in Section 11 of the Performance Specification.

"Trainset Incremental Service Payment" means the payment by this name set forth in Attachment B to the Signature Document, which shall take the form of Trainset Incremental Service Payment 1, 2, 3, 4 or 5.

"Trainset Service Period" means a 30-year period of time associated with an individual Trainset that commences on Owner's issuance of a Certificate of interim Final Acceptance for that Trainset, if any, or the Certificate of Final Acceptance for that Trainset.

"Trip" shall have the meaning given to it in Schedule 6 to the General Provisions.

"Unscheduled Spares" means Spares, excluding Capital Spares, which are not identified as being scheduled to be replaced in the Maintenance Plan.

"Vehicle" has the meaning given to it in Section 3.2 of the Performance Specification.

"Warranty Period" means the warranty periods for an individual Trainset component as described in Article 12.4.

"Warranty Spares" means the spare parts Contractor is required to maintain and provide pursuant to Article 13 as part of its warranty obligations.

"Work" means the provision of designs, Deliverables, engineering, manufacturing, assembly, testing, operations, maintenance services or other activities/services performed under the Contract.

"Working Day(s)" means each weekday(s) that is not an Owner holiday. Owner holidays include New Year's Day (January 1), Martin Luther King, Jr., Day (third Monday in January), Presidents' Day (third Monday in February), Memorial Day (last Monday in May), Independence Day (July 4), Labor Day (first Monday in September), Thanksgiving Day (fourth Friday in November), and Christmas Day (December 25).



2. INTERPRETATION OF DOCUMENTS

The Contract constitutes the entire agreement of the Parties. Contractor acknowledges that it has not been induced to enter into the Contract by any representations or promises not specifically stated in the Contract. Unless otherwise specified herein, all previous or contemporaneous proposals, letters, promises, representations, documents, agreements, or understandings relating to the subject matter of the Contract are hereby declared to be null and void and are superseded by the terms of the Contract. The terms and conditions of the Contract supersede any and all terms and conditions submitted by Contractor prior to, concurrently with, or pursuant to the Contract. Any additional or different terms proposed by Contractor are expressly rejected unless specifically accepted in writing by Owner. No other terms and conditions, or changes or modifications to the Contract shall be binding upon Owner unless agreed to in writing.

2.1 Any inconsistencies in the Contract shall be resolved by giving precedence in the following order, provided that Contract Modifications, including Change Orders, shall have priority just above the document that is being amended:

- (a) Tripartite Agreement;
- (b) Signature Document, including Attachments thereto, except the Proposal Commitments in Attachment C;
- (c) Supplemental General Provisions;
- (d) General Provisions (without Schedules);
- (e) Performance Specification set forth at Schedule 1A;
- (f) All other Schedules to the General Provisions;
- (g) All other documents identified as part of the Contract in the RFP; and
- (h) Proposal, including the Proposal Commitments in Attachment C to the Signature Document (provided that if Owner determines, in its sole discretion, that the Proposal contains a provision that is more beneficial to Owner than is otherwise required, that Proposal provision shall take precedence).

2.2 As used in this Contract, unless the context otherwise requires, the singular shall include the plural, and the masculine gender shall include the feminine and neutral genders and vice versa. References to statutes or regulations include all statutory or regulatory provisions consolidating, amending, or replacing the statute or regulation. The words "including," "includes" and "include" shall be deemed to be followed by the words "without limitation." Words such as "herein," "hereof," and "hereunder" refer to the entire document in which they are contained and not to any particular clause, provision, section or Article. Words not otherwise defined that have well-known technical or construction industry meanings are used in accordance with such recognized meanings. References to Persons include their respective permitted successors and assigns and, in the case of Governmental Persons, Persons succeeding to their respective functions and capacities. Headings and organization within Articles are for convenience only. Unless otherwise specified, lists contained in the Contract defining the Work shall not be deemed all-inclusive; and unless otherwise specified, references to clauses and Articles include all sub-clauses and sub-Articles and references to clauses, paragraphs, Articles, sections, appendices, attachments, schedules and exhibits are to the document which contains such



references. In sentences using the imperative, unless otherwise specifically stated, the subject "Contractor" is implied and it is understood that Contractor shall perform such work, comply with the requirements of, furnish such material or take such action.

- 2.3** Notwithstanding the order of precedence set forth in Article 2.1, in the event of any conflict, ambiguity or inconsistency between or among any of the provisions in this Contract, including any standards or specifications applicable to the Work, the provisions that establish the higher quality, manner or method of performing the Work, exceed Good Industry Practice or use more stringent standards will prevail. Additional details in a lower priority document shall be given effect except to the extent they irreconcilably conflict with requirements, provisions and practices contained in the higher priority document.
- 2.4** The captions in these General Provisions are for the convenience of the Parties in identification of the several provisions and shall not constitute a part of the Contract nor be considered interpretative hereof.
- 2.5** Drawings and specifications are complementary. Anything shown in the drawings and not mentioned in the specifications, or mentioned in the specifications and not shown in the drawings, shall have the same effect as if shown or mentioned in both. Contractor is responsible for assuring that the drawings and specifications conform to the terms of the Contract. A typical or representative detail indicated on or reasonably inferable from the Contract or from normal custom and practice shall constitute the standard for workmanship and material throughout corresponding parts of the Work. Where necessary, and where reasonably inferable from the Contract, Contractor shall adapt, or have adapted, such representative detail for application to corresponding parts of the Work. Repetitive features shown in outline on the drawings shall be in reasonable accordance with corresponding features completely shown.
- 2.6** Contractor shall not take advantage of any apparent error, omission, inconsistency, inaccuracy, deficiency or other defect in the Contract. Should it appear that the Work to be done or any matter thereto is not sufficiently explained in the Contract Documents, Contractor shall apply to Owner in writing for such further written explanation as may be necessary and shall conform to the explanation provided. Contractor shall promptly notify Owner of all errors, omissions, inconsistencies, inaccuracies, deficiencies, or other defects that it may discover in the Contract and shall obtain specific instructions in writing from Owner before proceeding with the Work affected thereby. Errors or omissions in the Contract shall in no way affect Contractor's warranties under the Contract in all respects.
- 2.7** Contractor acknowledges and agrees that it had the opportunity and obligation, prior to submission of its Proposal, to review the Contract and to bring to the Owner's attention any conflicts or ambiguities contained therein. Contractor further acknowledges and agrees that it has independently reviewed the Contract with legal counsel, and that it has the requisite experience and sophistication to understand, interpret and agree to the particular language of the Contract. Accordingly, in the event of an ambiguity in or dispute regarding the interpretation of the Contract, the Contract shall not be construed against the Person that prepared it, and shall be considered as drafted by both Parties. Amtrak/Owner answers to questions provided during the solicitation shall in no event be deemed part of the Contract and shall not be relevant in interpreting the Contract except as they may clarify provisions otherwise considered ambiguous.



- 2.8** Amtrak's interpretation or implementation of the Amtrak Contract shall not be relevant in interpreting the Contract, including Amtrak's interpretation or implementation of similar or identical provisions in the Amtrak Contract and the Contract.

3. APPROACH AND SUPERVISION OF WORK

- 3.1** Contractor shall be fully responsible to perform the entirety of the Work, including, but not limited to, all materials, services and efforts necessary to perform the Work, on or before the deadlines set forth in the Contract, and subject to Article 14, the cost of Contractor's performance of the Work is included in the Contract Amount and Contract Time.
- 3.2** Contractor shall perform the Work in accordance with all professional engineering principles and manufacturing practices generally accepted as standards of the industry, in a good and workmanlike manner, suitable for its intended purpose (as set forth in the California Streets and Highways Code, Chapter 20, Article 2, Section 2704.09 except with Trainset operating speeds of up to 220 mph), free from defects and in accordance with the terms and conditions set forth in the Contract.
- 3.3** Contractor and all Work performed by Contractor shall comply with all Applicable Laws that bear on the performance of the Work.
- 3.4** Notwithstanding Article 3.3, with respect to the manufacturing of Fleets 1 and 2 (through Fleet Acceptance for those Fleets) and no other Work, to the extent Applicable Laws and the draft Tier III regulations in Schedule 10 are inconsistent, Contractor shall comply with the draft regulations. Schedule 10 shall not otherwise apply to Contractor or the Work.
- 3.5** Contractor and the Work shall comply with the current version of all standards referenced in the Contract. Contractor shall not be entitled to any relief for changes to the referenced standards.
- 3.6** Notwithstanding Article 3.5, the following versions of referenced standards shall apply to Contractor and the Work:
- (a) for the manufacturing of Fleets 1 and 2 (through Fleet Acceptance for those Fleets) and no other Work, the versions in place 30 days prior to the "Financial Proposals Due (Hard and Electronic) Close Date" set forth in Section 5 of the Instructions to Offerors (or 30 days prior to submission of a revised proposal or best and final offer, if any); and
 - (b) for all Fleets, if the Contract references a specific version or date for a standard, that version shall apply.
- 3.7** Contractor shall use a systematic management approach to provide completed Trainsets meeting all specified performance levels compatible with all elements of the railway system over which the Trainsets shall operate, for the useful life of the Trainsets as defined in the Contract. Contractor shall apply this management approach throughout the design, development, production and delivery phases of the Contract and shall apply to all aspects of the Work or material or components of the Trainsets provided by Contractor or its Subcontractors.
- 3.8** Contractor shall be fully responsible to Owner for all acts and omissions of all Contractor-Related Entities.



- 3.9** Contractor shall require that each Subcontractor, except as otherwise provided herein, shall provide all labor, tools and materials necessary to make, assemble, and completely test, ready for installation by Contractor, the component or apparatus to be furnished by said Subcontractor.
- 3.10** Contractor shall require that the Subcontractors shall cooperate, to the fullest extent possible during design and manufacture of the Trainsets, to ensure proper use and installation of their products. The Subcontractors shall give prompt notice to Contractor and Owner if the use or installation of their equipment by Contractor is not satisfactory to them. No agreement with respect to the above shall be made without immediate conference at which Owner, Contractor and the Subcontractor are each represented, and the resolution is approved by Owner. Copies of purchase orders (which may have prices and delivery terms deleted) shall be promptly submitted to Owner upon request.
- 3.11** Contractor shall take measurements and verify all conditions and shall carefully compare such measurements and conditions and other information known to Contractor with the Contract before commencing activities. Errors, inconsistencies or omissions discovered shall be reported, in writing, to Owner at once. Contractor shall satisfy itself as to the accuracy of all measurements and conditions. Any errors due to Contractor's failure to so verify and to so take measurements shall be promptly rectified by Contractor without any additional cost to Owner. No Change Order, whether for an adjustment in the Contract Amount or Contract Time, shall be allowed based on any such error described in this Article.
- 3.12** The Work, including each Trainset, Special Tool, Spare and related equipment and accessories furnished by Contractor under the Contract shall be new, the best of its kind or quality, free from defects in design, material, and workmanship and suitable for the purpose intended, and shall be constructed and shall operate in conformance with all requirements of the Contract.
- 3.13** Contractor shall secure and pay for, as part of the Contract Amount, all required Governmental Approvals. Contractor shall comply with all conditions imposed by and undertake all actions required by and all actions necessary to maintain in full force and effect, all Governmental Approvals, except to the extent that such responsibility is expressly assigned in the Contract to another Person.

For any Governmental Approvals required to be obtained by Contractor, Contractor shall, subject to Owner approval, prepare all information analyses and materials, and otherwise undertake all efforts to obtain such Governmental Approvals, including execution and delivery of appropriate applications and other documentation in a form approved by Owner. Owner shall reasonably cooperate with Contractor in obtaining any such Governmental Approvals. Contractor shall assist Owner in obtaining any Governmental Approvals that Owner may be obligated to obtain, including providing information requested by the Owner and participating in meetings regarding such Governmental Approvals.

- 3.14** Contractor shall be responsible for providing, at its own cost, for the storage of all work product under the Contract, including each of the Trainsets, Driving Simulator, Spares, and Special Tools, if any, at all times until Owner's issuance of a Certificate of Final Acceptance or Certificate of Conditional Acceptance, as the case may be, of such Trainsets or, in the case of Spares and Special Tools, until acceptance of such Spares and Special Tools under Articles 9.8 and 9.10. If appropriate, Contractor shall afford other Owner contractors reasonable opportunity for the introduction and



storage of their materials and equipment and the execution of their work, and shall properly connect and coordinate the Work with their work.

- 3.15** Contractor shall not be relieved of its obligation to design and otherwise perform the Work in accordance with the Contract, or any of its other obligations under the Contract, by oversight, spot checks, assessments, reviews, tests, inspections, acceptances, Statements of no Objection, Statements of Objection, approvals, or by any failure of any Person to take such action. Such Owner actions or non-actions do not constitute final acceptance of the particular material or Work, or waiver of any legal or equitable right with respect thereto. Owner may reject or require Contractor to remedy any nonconforming Work and/or identify additional Work which must be done to bring the Work into compliance with Contract requirements, independent of any such Owner action or non-action.
- 3.16** Owner's authorized representatives are acting solely as agents and representatives of Owner when carrying out the provisions of or exercising the power or authority granted to them under the Contract. These individuals shall not be liable either personally or as employees of Owner for actions in their ordinary course of employment. No agent, consultant, officer or employee of Owner shall be personally responsible for any liability arising under the Contract.
- 3.17** If Contractor identifies any improvements and/or modifications in relation to the design, testing and manufacturing process of the Trainsets or other similar rolling stock, it will notify Owner and discuss in good faith whether and how such improvements could be incorporated into the design, manufacturing, testing and operation of the Trainsets.
- 3.18** Contractor shall be responsible for the professional quality, technical accuracy, and the coordination of all designs, drawings, specifications, and other non-construction services furnished by Contractor under this Contract, regardless of whether certain conceptual design work occurred and/or specifications were provided to Contractor prior to the date of execution of the Contract. Contractor shall, without additional compensation, correct or revise any errors or deficiency in its designs, drawings, specifications, and other non-construction services, and perform any necessary rework or modifications, including damage to real or personal property, resulting from the design error or omission.
- 3.19** Contractor shall submit all documentation and drawings for either Owner "review" or Owner "approval" as described in this Article 3.17. All submittals are for Owner review, unless the Contract expressly states that the submittal is for Owner approval. Design submittals shall be provided by Contractor in accordance with its Submittal and Design Review Program, as set forth in Article 19.

In response to a submittal for Owner review, Owner's response, if any, will fall into one of the three following categories:

- "Statement of No Objection"
- "Statement of No Objection With Comments"
- "Statement of Objection"

In response to a submittal for Owner approval, Owner's response will fall into one of the two following categories:

- "Approved"



- “Not Approved”

Unless otherwise specifically required by the Contract, Owner is not required to respond to submittals that are for Owner review. Owner shall respond to any submittal for approval within 45 days after receipt, unless the Contract expressly provides a different response time.

When Owner returns a submittal “Not Approved” or “Statement of Objection”, Owner will transmit the reasons to Contractor. Should Contractor not understand or agree with Owner’s comments, Contractor shall initiate correspondence with Owner regarding resolution of the matter within 15 days after Contractor’s receipt of the returned submittal bearing such comments. Contractor shall address Owner’s comments and resubmit the entire package within 30 days after Contractor’s receipt of the returned submittal; partial resubmission will not be acceptable except at the discretion of Owner. For submissions returned “Statement of No Objection With Comments”, Contractor shall as soon as possible, but not later than 30 days after receipt of Owner’s response, address the comments.

- 3.20** Unless otherwise indicated in the Contract, the level of discretion applied to any Owner approval, Owner’s non-approval, Statement of No Objection, Statement of No Objection with Comments, and Statement of Objection determinations is reasonable discretion, as opposed to other levels of discretion (e.g., sole discretion).

4. DESIGN REQUIREMENTS

4.1 Design of the Work

4.1.1 Design

Contractor shall be solely responsible for designing the Trainsets including the Prototype Trainsets, and for performing all other design activities related to the Work. Contractor shall proceed with the design of the Work and the submission of design to Owner, in accordance with the Contract, including but not limited to the Baseline Program and the Submittal and Design Review Program.

As part of Contractor’s design obligations, Contractor’s design of a Trainset shall demonstrate to the reasonable satisfaction of Owner that the requirements of the Performance Specification in relation to that Trainset have been understood by Contractor and that the implementation of Contractor’s design will lead to Work which at all times meets the requirements of the Contract, including Contract requirements related to Contractor provision of Spares set out in Article 13.

Contractor understands and agrees that Owner shall not be responsible or liable in any respect for loss, damage, injury, liability, cost or cause of action whatsoever suffered by any Contractor-Related Entity by any reason of any use of any information contained in the design, drawings, specifications or elsewhere in the Contract or any action or forbearance in reliance thereon, except to the extent that Owner has specifically agreed herein that Contractor shall be entitled to an increase in the Contract Amount and/or an extension of Contract Time with respect to such matter pursuant to the process set forth in Article 14.



4.1.2 Technical Documentation

Contractor shall provide Technical Documentation including Manufacturing Drawings to a level of detail suitable for assembly, maintenance, wreck repairs, overhaul and operation. The Technical Documentation will be used by Owner to conduct design reviews of Contractor's design. Technical Documentation and Manufacturing Drawings shall record the as-built, installed, tested and commissioned system and shall provide sufficient information for the continued safe operation and maintenance of the Work. The Technical Documentation shall conform to a standard and format that shall be Good Industry Practice using an electronic document management system. Design drawings shall identify the codes and standards with which the design is compliant. For all software used in the design effort, Contractor shall provide Owner sufficient information to allow a complete understanding of the function and interface requirements. The level of detail shall be sufficient to permit complete verification of all operational, reliability and safety criteria.

The Technical Documentation for Trainsets shall include, but not be limited to, detailed technical descriptions and a list of technology to be utilized in the design and production of the Trainsets.

4.1.3 Submittal and Design Review Program

Contractor shall submit its Submittal and Design Review Program within 60 days after NTP for Fleet 1. The Submittal and Design Review Program shall be updated by Contractor whenever the Owner Representative directs and in consultation with the Owner Representative.

Contractor shall assume that design packages submitted by Contractor for approval are limited to those submissions related to appearance, color scheme, interior and exterior layouts, etc. that involve a personal preference. Contractor shall submit all remaining design submissions for Owner review (not approval).

4.1.4 Design Reviews

Owner may conduct design reviews as part of the Design Review Process to satisfy itself that Contractor's designs appear to conform to the Contract technical requirements. Contractor shall provide all reasonable assistance to Owner to enable him to carry out the design review. Design reviews will be conducted throughout the design process and shall generally comprise a formal design submission process supported by design presentations. The Design Review Process shall include:

- (a) Preliminary design reviews giving outline information in a formal submission;
- (b) Intermediate design reviews giving developed design information in a formal submission;
- (c) Final design reviews giving detailed design information in a formal submission;



- (d) Design progress meetings presenting the design package; and
- (e) A system design review shall be started as soon as all Principal Design Units have completed their preliminary design reviews.

Each design submission shall be for a distinct part of the Work and shall contain all the details necessary to enable Owner to be able to understand and review the design, and to satisfy itself that the design submitted appears to conform to the Contract requirements and the performance requirements contained therein.

Contractor shall expeditiously answer all queries from Owner concerning any design submission, and shall take this requirement into account in the Baseline Program which deals with the development and completion of the design of the Work.

4.1.5 Number of Copies

Contractor shall submit one electronic copy and five hard copies of all design submissions.

4.1.6 Design Submission to be Approved

Where any design submission is required to be approved by Owner, then except as otherwise specifically stated in this Article:

- (a) Any further design or manufacturing work carried out pending receipt of such approval shall be entirely at Contractor's risk; and
- (b) If such approval is not received, then all additional work shall be solely at the cost of Contractor and with no entitlement to an extension of the Contract Time.

Provided, however, that if the design submission is in conformity with the requirements of the Contract, and Owner fails to give its approval within the required response time, then subject to otherwise complying with the requirements of the Contract, if as a result of such failure by Owner to respond, Contractor incurs additional costs and/or is delayed in its performance of the Work, Contractor shall be entitled to claim an increase in the Contract Amount and/or an extension of the Contract Time.

4.2 Configuration Management

4.2.1 Configuration Management System

Contractor shall maintain accurate, thorough and current records throughout the performance of the Work. A single Configuration Management system shall apply to all material furnished irrespective of its origin. All Technical Documentation shall be identified by title, number, issue, revision and date. All documents shall carry a configuration identity. The Configuration Management system shall include:

- (a) Identification of and documentation of the physical and functional characteristics of components and systems as defined by technical information including functional schematics, physical schematics,



applicable standards, software flow diagrams, software architecture, software source code, drawings, layouts, plans, specifications, specification control drawings, and both maintenance and operating manuals;

- (b) A means to search out associated documents, including next higher and lower levels, assembly level, specifications, software, and documents;
- (c) Drawing trees for all major systems and subsystems, with drawing identities reserved by groups;
- (d) Specification and process trees for all major systems and subsystems, with engineering unit description identities reserved by groups;
- (e) Change control procedures, wherein the approval status of any document can be determined;
- (f) Identification of completed incorporated changes;
- (g) Posting of pending changes against any document; and
- (h) Identification of the effect on manufacturing for any changed document.

The following principles shall be incorporated in the Configuration Management system:

- (v) Changes will not be initiated without affected party review;
- (w) A change board will be established;
- (x) A materials review board will be established;
- (y) At the time of submittal of as-built drawings, incorporation of changes can be verified by inspection or demonstration; and
- (z) Records of change assessment will be kept.

Contractor shall keep history logs, including photographic progress records, for all Trainsets and for all Principal Design Units of the Trainsets. The history logs are to identify all the parts, the associated part, drawing, or identity, with change level applicable. History logs are to accompany items shipped for installation and be updated after installation and as as-built drawings. Contractor is required to close the history log with a set of as-built or as-installed documentation including all internal interfaces and those external interfaces affecting the Work.

4.2.2 Configuration Management Plan

Contractor shall produce a Configuration Management Plan within 60 days after NTP for Fleet 2.



4.2.3 Configuration Control

Pursuant to the Configuration Management Plan developed pursuant to Article 19, Contractor shall establish a configuration control system consistent with the requirements for controlling the hierarchy and arrangement of the Technical Documentation and changes thereto. The system shall record, as a minimum:

- Changed items;
- Reason for change;
- Authority for change;
- Date of change;
- Approval status; and
- Any other significant data.

The configuration control system shall differentiate between major and minor changes to the Technical Documentation. All major changes shall require re-submittal of the relevant Technical Documentation to the Owner. Examples of major changes include changes that affect any of the following factors:

- Safety;
- Schedule or deliveries;
- Performance outside the requirements;
- Delivered equipment, so as to require retrofit;
- Adjustments or schedules affecting operating limits or performance;
- Reliability or maintainability outside agreed tolerances;
- Physical or functional interchangeability;
- Maintenance practices;
- Maintenance manuals;
- Training;
- Spares;
- Sources of equipment;
- EMI/EMC characteristics;
- Interface characteristics;
- Environment; and
- Compatibility with training program.

Changes recording the incorporation of corrections are classified as minor if the correction did not involve a change classified as major. These include changes that deal only with manufacturing processes or sources in a way such that the physical and functional interchangeability, maintenance practices, maintenance manuals, and spares provisioning are unaffected. Minor changes do not require Owner action.



4.3 Baseline Program

Contractor shall provide a Baseline Program that demonstrates a complete understanding of the Work, inclusive of all phasing and sequencing considerations and shall include, but not be limited to:

- A critical path method (“CPM”) schedule showing the order in which Contractor intends to prosecute the Work and critical dates for start and completion of various portions of the Work, including delivery of major components;
- The dates on which Contractor plans to start and complete various Work stages, operations, and principal items of Work, compatible with Primavera 6. Such dates must comply with the Trainset Acceptance Deadlines set forth in Article 4 of the Signature Document and any other deadlines set forth in the Contract;
- All major submittals to Owner; and
- Milestones and detailed scope definitions.

Contractor shall submit its proposed Baseline Program for Owner’s approval, or update its Baseline Program for Owner’s approval, as applicable, within 60 days after each NTP. Owner shall respond to the submission within 60 days after receipt. The proposed Baseline Program shall only become the Baseline Program once Contractor has received Owner’s approval. Owner shall continuously review and update any operations or maintenance-related programs, plans, manuals, and training materials developed under the Contract to ensure that they are accurate and current, including but not limited to updates to the Maintenance Plan, maintenance manuals, maintenance procedures, Maintenance Training Plan and maintenance training manuals described in Article 13.3.

Contractor shall continue to monitor and manage the Baseline Program throughout the progress of the Work. Should an impact of any nature whatsoever to the Baseline Program be identified by Contractor, Contractor shall immediately notify Owner in writing and provide recommendations for actions to be taken in order to mitigate the delay.

If in Owner’s opinion, the Baseline Program no longer reflects the progress of the Work, Owner may direct the Baseline Program to be updated, provided that such direction shall not modify, amend or add to Contractor’s obligations or otherwise affect Contractor’s rights under the Contract.

4.4 Design Flexibility

Notwithstanding any other provision of the Contract to the contrary, Owner shall be entitled, prior to the date specified in the Submittal and Design Review Program, to instruct changes to non-fundamental structural elements, including but not limited to, the proposed layout and components of the Trainsets’ passenger amenities, such as toilets, luggage racks, luggage storage, bicycle storage and seating arrangements. Notwithstanding the above, Contractor shall under no circumstance design or manufacture a Trainset with less than 440 seats.

Contractor shall not be entitled to receive an increase in the Contract Amount or an extension of the Contract Time for changes described in this Article 4.5; provided, however, that if as a result of an Owner-instructed modification:

- (a) of a fundamental structural element, or



- (b) of a non-fundamental structural element given after the date specified in the Submittal and Design Review Program,

Contractor incurs additional costs and/or is delayed in its performance of the Work, then Contractor shall be entitled to claim an increase in the Contract Amount and/or an extension of the Contract Time.

4.5 List of Spares

4.5.1 Preliminary and Updated Lists

Contractor shall submit, as part of its preliminary design review submissions under Article 4.1.4(a), a provisional list of the Consumable Spares, Scheduled Spares and Warranty Spares Contractor anticipates providing to comply with its obligations under the Contract. The portion of this list dedicated to Consumable Spares shall address the Consumable Spares Contractor intends to supply with each Trainset, listing each spare part separately, and the per-unit cost to Owner for each part. Hardware, including fasteners, listed in the spare parts list shall be specified by grade, type of thread style, length, diameter and finish.

Additionally, at least three months prior to delivery of the first Trainset, Contractor shall submit an updated list of Spares. In preparing this list, Contractor shall assume that the Trainsets shall be maintained at up to three separate Owner maintenance sites (including one heavy maintenance site and two daily inspection/running repair sites) and that Spares shall be placed in inventory by Contractor at each site at an adequate rate to keep the Trainsets in service.

4.5.2 Spares Pricing

The provisional list and the updated list described in Article 4.6.1 shall include the price of each item with an indication of which items are biodegradable and the estimated shelf life of each item. The updated list of Spares described in Article 4.6.1 shall also list the Spares and any other items which Contractor plans to inventory, or those of its Subcontractors, and whether such parts are readily available to Owner for immediate procurement when needed. Contractor shall also prepare a list that identifies Spares that cannot be procured within a 30 day period from the date of the applicable order. Spares shall be listed showing the original manufacturer's name, lead time and part number as well as Owner part number. Subassemblies shall be broken down into their individual components so that the components can be ordered separately. Where parts are supplied by a company with several departments, the number from the original manufacturing department shall be included in the parts lists. All electronic components shall be available from recognized electronic distributor sources in the United States.

5. COMMENCEMENT OF WORK

- 5.1** Contractor shall not perform any Work (or recommence any of Work following suspension) until Owner issues a Notice to Proceed ("NTP") for such Work.
- 5.2** Before Owner issues an NTP for a particular Fleet, it shall issue to Contractor a preliminary notice indicating its intent to issue an NTP for that Fleet (a "Preliminary Notice"). The deadlines for Owner to issue Preliminary Notices are set forth in Article 3 of the Signature Document.



- 5.3** Upon receipt of a Preliminary Notice for one or more of Fleets 1 through 6, and in accordance with the process set forth in Article 10.5, Contractor shall calculate and submit to Owner in writing:
- (a) an escalated Milestone Contract Amount for Fleet 1 and Fleet 2 and/or Options Unit Prices for Fleets 3-6 (with corresponding Milestone Contract Amounts), as applicable; and
 - (b) an escalated Manufacturing Restart Payment, recognizing that Owner will only pay the Manufacturing Restart Payment under the conditions set forth in Article 10.3.
- 5.4** Once Owner approves the escalated amounts pursuant to Article 10.5, the Parties shall amend Attachment B to the Signature Document to document the agreed upon escalated amounts. If Owner issues a Preliminary Notice for Fleet 6 after the deadline for Owner to issue Preliminary Notice(s) related to Fleet 6 set forth in Article 3 of the Signature Document, the Parties shall commence negotiating Contractor's payment for delivering the Fleet 6 Trainsets and providing Spares and other services related to those Trainsets.
- 5.5** Once the Parties amend Attachment B to the Signature Document in response to a Preliminary Notice as described in Article 5.4, Contractor shall diligently pursue financing for the Fleet(s) covered by the Preliminary Notice and shall notify Owner in writing as soon as it secures such financing. If Contractor determines it will not need to obtain financing for a particular Fleet(s), it shall notify Owner in writing as soon as it makes this determination.
- 5.6** Owner shall issue NTP for Fleets 1 and 2, as applicable, 180 days after Owner issues the Preliminary Notice for that Fleet. For Fleets 3 through 6, Owner and Contractor shall agree on the date that Owner will issue NTP, provided that date is within 180 days of Owner's issuance of the Preliminary Notice for that Fleet. If Owner and Contractor cannot agree on a date, Owner will issue NTP 180 days after the date of the Preliminary Notice.
- Owner will issue all NTPs to Contractor by facsimile and/or letter and Contractor shall signify the receipt of same by return facsimile or letter. The date of transmittal by Owner of an NTP shall constitute its effective date.
- 5.7** Notwithstanding Owner's issuance of an NTP as described in Article 5.6, Contractor shall not commence any Work under an NTP until the following conditions are satisfied:
- (a) All Governmental Approvals necessary for the Work covered by the NTP have been obtained and all conditions of such Governmental Approvals that are a prerequisite to the commencement of the Work covered by the NTP have been performed;
 - (b) All insurance policies required to be submitted to Owner for the Work have been submitted and approved as applicable and remain in full force and effect; and
 - (c) Contractor has provided to Owner a letter of credit in compliance with Article 6.2 and that letter of credit remains in full force and effect.



- 5.8** The date Owner issues an NTP for a Fleet shall be considered by Owner as the date the Work covered by such NTP commences and shall provide the basis for the calculation of timely completion of the Work for such Fleet.
- 5.9** Any Work performed or expenses incurred by Contractor prior to Contractor's receipt of a written NTP for such Work is at Contractor's sole risk.
- 5.10** If not otherwise stated, references in the Contract to an NTP mean the NTP for Fleet 1 in the event Owner issues more than one NTP.

6. PERFORMANCE SECURITY AND GUARANTY

- 6.1** Contractor shall provide performance and warranty security as described in this Article. Notwithstanding any other provision of the Contract, performance by a financial institution or Guarantor of any of the obligations of Contractor hereunder shall not relieve Contractor of any of its obligations hereunder.
- 6.2** For each Fleet ordered by Owner under the Contract, Contractor shall provide to Owner within 30 days after receipt of NTP for the Fleet and maintain at all times thereafter until the date Owner issues a Certificate of Fleet Acceptance for the Fleet, a properly executed irrevocable letter of credit in the form included as Schedule 7 (Letter of Credit (Performance)) and in the amount of 50% of the escalated Milestone Contract Amount for the Fleet agreed to by the Parties pursuant to Article 5.4.
- 6.3** For each Fleet ordered by Owner under the Contract, Contractor shall provide to Owner and maintain at all times from the date Owner issues a Certificate of Fleet Acceptance for the Fleet to 30 years from that date a properly executed irrevocable letter of credit in the form included as Schedule 8 (Letter of Credit (Maintenance)) and in the amount of 10 percent of the Trainset Incremental Service Payments for that Fleet, as escalated pursuant to Article 10.5.
- 6.4** Letters of credit provided by Contractor pursuant to Articles 6.2 and 6.3 that include an expiration date shall provide for automatic renewal no later than 30 days prior to the expiration date.
- 6.5** The issuer of any irrevocable letter of credit under the Contract must be a financial institution that, at a minimum:
- (a) is not a Contractor-Related Entity; and
 - (b) has a credit-rating for long-term, unsecured debt of not less than "A-/A3"; and
 - (c) meets one of the following conditions:
 - (i) is organized and existing under the laws of the State;
 - (ii) is organized under the laws of the United States and has its principal place of business in the State; or
 - (iii) has a branch office in the State which is authorized under the laws of the State or of the United States to receive deposits in the State.
- 6.6** Owner may require any financial institution to appear and qualify itself at any time. If Owner determines, in its sole discretion, that the financial institution is not qualified, or if the financial institution issuing the letter of credit fails to maintain the credit rating



set forth in Article 6.5, Contractor must deliver a substitute letter of credit issued by a qualified financial institution acceptable to the Owner at no additional cost within 30 days or otherwise furnish additional security acceptable to Owner as may be required from time to time to protect the interests of Owner. Until the replacement irrevocable letter of credit is furnished, payments on the Contract shall stop.

- 6.7** If Owner makes a draw on the letter of credit, Owner shall be entitled to draw on the full face amount of the letter of credit and shall retain such amount as cash security to secure the obligations under the letter of credit, without payment of interest to Contractor.
- 6.8** Draw on letters of credit shall not be conditioned on prior resort to Contractor or any other security of Owner. For all draws conditioned on prior notice from Owner to Contractor, no such notice shall be required if it would preclude draw before the expiration date of the letter of credit. Owner shall use and apply draws on letters of credit (or cash security held from draws on letters of credit) toward satisfying the relevant obligation of Contractor (or, if applicable, any other Person for which the letter of credit is performance security). Subject to Owner's rights under the Contract, if Owner receives proceeds of a draw in excess of the relevant obligation, Owner shall promptly refund the excess to Contractor (or such other Person) after all relevant obligations are satisfied in full.
- 6.9** Contractor's sole remedy in connection with the improper presentment or payment of sight drafts drawn under letters of credit shall be to obtain from Owner a refund of the proceeds which are misapplied, and reimbursement of the reasonable costs Contractor incurs as a result of such misapplication; provided that at the time of such refund Contractor increases the amount of the letter of credit to the amount (if any) then required under applicable provisions of this Contract. Owner acknowledges that the presentment of sight drafts drawn upon a letter of credit could not under any circumstances cause Contractor injury that could not be remedied by an award of money damages, and that the recovery of money damages would be an adequate remedy. Accordingly, Contractor covenants (a) not to request or instruct the issuer of any letter of credit to refrain from paying any sight draft drawn under the letter of credit and (b) not to commence or pursue any legal proceeding seeking, and Contractor irrevocably waives and relinquishes any right, to enjoin, restrain, prevent, stop or delay any draw on any letter of credit.
- 6.10** Contractor shall obtain and furnish all letters of credit and replacements thereof at its sole cost and expense, and shall pay all charges imposed in connection with Owner's presentment of sight drafts and drawing against letters of credit or replacements thereof.
- 6.11** If Owner makes a permitted assignment of its rights and interests under this Contract, then Contractor shall cooperate so that concurrently with the effectiveness of such assignment, either replacement letters of credit for, or appropriate amendments to, the outstanding letters of credit shall be delivered to the assignee naming the assignee as beneficiary, at no cost to Contractor.
- 6.12** Contractor shall promptly furnish additional security required to protect Owner and persons supplying labor or materials under this Contract in the following situations:
- If any financial institution upon any irrevocable letter of credit furnished with this Contract becomes unacceptable to Owner; or
 - If any financial institution fails to furnish reports on its financial condition as required by Owner.



- 6.13** Contractor has provided Owner with one or more Guaranties to assure performance of Contractor's obligations hereunder. Contractor shall maintain such Guaranties in full force and effect throughout the term of the Contract.

A copy of each executed Guaranty is attached to the Signature Document as Attachment E.

7. TRAINSET EXHIBITS, MOCK-UPS AND MODELS

- 7.1** The Work under the Contract shall include the development of mock-ups and Trainset Exhibits for the Trainsets. Contractor shall make these materials available to Owner by no later than the date specified for such delivery in the Baseline Program. Contractor shall make these materials available to Owner for three months, at a location in California designated in writing by the Owner. Contractor shall, at its own cost, update and revise the mock-ups and Trainset Exhibits during this period when necessary to reflect changes made as part of the design process, including revisions to address:

- (a) any non-structural changes requested by Owner as described in Article 4.5;
- (b) obsolescence of technology;
- (c) problems identified by Amtrak with the trainsets produced by Contractor for Amtrak under the Amtrak Contract;
- (d) inability to locate the materials contemplated under the Trainset design; and
- (e) any other Trainset design changes.

Contractor shall keep a detailed log and photographic record (each of which shall be available to Owner at all times) of all changes which are made to the mock-ups. Additional requirements and information relating to mock-ups are set forth in the Performance Specification.

- 7.2** Within 20 Working Days after the three month period referred to in Article 7.1, Contractor shall deliver the updated mock-ups and Trainset Exhibits to Owner, or its nominated training organization, at a location in California designated in writing by Owner.
- 7.3** Title to the updated mock-ups and Trainset Exhibits described in Articles 7.2 shall pass to Owner on delivery to and acceptance by Owner in accordance with Article 9.12.
- 7.4** Not later than three months after Contractor's delivery of the first Trainset, Contractor shall deliver to Owner three G scale (1:22.5) models of the as-built Trainsets, provided with showcase and base.

8. TESTING AND INSPECTION

8.1 Testing and Commissioning

All inspection, testing and commissioning applicable to the Work shall be conducted in accordance with the Testing and Commissioning Program. Owner and Contractor acknowledge that the Testing and Commissioning Program will be



developed and expanded during the course of the Contract as may be necessary to comply with Contract requirements.

8.2 Costs of Tests

Except as provided for in the Testing and Commissioning Program or expressly in this Article 8, the costs of carrying out any test and inspection under the Contract including the cost of all utilities consumed shall be borne by Contractor.

8.3 Inspection at Manufacturers' Premises

Owner, FRA, and such other Persons as Owner shall approve in writing may inspect the manufacturing or production of any items of core system equipment at the manufacturer's plant during normal business hours. Free access to all parts of the plant related to the manufacturing or production of any items of the Work shall be available upon reasonable prior notice. Adequate Facilities shall be made available for any such inspection; however, Owner shall not be obligated to inspect any items of the Work at the source of manufacture or production. Contractor shall have appropriate provisions inserted into each agreement it enters into providing for in-plant inspection in accordance with this Article 8.3.

8.4 Non-Conforming Work

Owner shall not pay for non-conforming Work. Owner may reject any non-conforming Work or require Contractor to remedy non-conforming Work and/or identify additional Work which must be done to bring the Work into compliance with the Contract requirements. Owner's inspection, testing, review, approval, commissioning or payment for any Work, including non-conforming Work, shall not affect Owner's rights, nor shall it otherwise relieve Contractor of its obligations under the Contract.

At its own cost and without a time extension, Owner may require Contractor to replace or correct any part of the Work not meeting the requirements of the Contract, unless Owner, in Owner's sole discretion, consents in writing to accept the non-conforming Work.

- Contractor shall notify Owner when deficient Work is identified by submitting a non-conformance report.
- Deficient Work shall remain open until the root cause of the deficient Work is identified and a corrective action plan implemented to address the problem. All corrective action plans and subsequent close out reports shall be submitted to Owner. Owner may review and issue an objection to either the corrective action plan in which case Contractor shall resubmit the plan to incorporate the comments.
- If Contractor chooses to place Work on identified non-conforming Work, Owner shall not pay for the Work performed until the non-conforming Work is brought into conformance with the Contract.
- Owner may choose to conduct testing on a piece of Work that has been completed by Contractor. Should the test results prove non-conformance, then Contractor shall rectify the defect at its own cost and without a time extension. Should test results fail to establish non-conformance, Owner is responsible for all costs and time impacts associated with the testing and restoration of the affected Work.



- Contractor's decision to "remove from site," "rework," "repair" or "use as is" shall be recorded in a non-conformance log regardless of who originated the non-conformance.

Owner may, in its sole discretion, consent in writing to accept non-conforming Work without requiring it to be fully corrected, in which case (i) the Contract Amount shall be decreased accordingly, or (ii) such amount shall be recoverable from Contractor by Owner by way of set-off against any amounts due and payable to Contractor. Contractor shall promptly segregate and remove rejected work at its own cost and without any time extension.

8.5 Contractor Delay in Addressing Nonconforming Work

If Contractor does not promptly replace or correct any part of the Work not meeting the requirements of the Contract, Owner may, in addition to any other remedies which Owner may have under the Contract:

- (a) replace or correct such part of the Work and charge the cost thereof to Contractor and either:
 - (i) the Contract Amount shall be decreased by an amount equal to such cost, or
 - (ii) such cost shall be recoverable from Contractor by Owner by way of set-off in against amounts due and payable to Contractor; or
- (b) conditionally accept such part of the Work and require Contractor subsequently to repair or correct the same.

8.6 Contractor Responsibility to Furnish Labor, Equipment and Materials

Contractor shall, except as otherwise provided in the Testing and Commissioning Program or this Article 8, promptly furnish, at its own cost, all labor, equipment and materials required for performing such inspections and tests as may be required under the Testing and Commissioning Program, including without limitation the Facilities, assistance and calibrated test equipment to enable Owner to test equipment and systems at Contractor's premises.

8.7 Trainset Weighing and Energy Efficiency Measurements

For each Trainset, after Owner has issued a Certificate of Conditional Acceptance for a Trainset, but before Owner's issuance of a Certificate of Final Acceptance for that Trainset, Contractor shall:

- (1) weigh the Trainset at Contractor's premises to determine the weight of the Trainset's (a) axle load and (b) unsprung axle load; and
- (2) measure the Trainset's per-mile net kWh energy usage, assuming the alignment specified in Schedule 1.

Contractor shall have these weights and energy measurements certified by one or more independent third-parties previously approved in writing by Owner. Contractor shall provide Owner a copy of the weights and energy measurements (with detail regarding any associated tests) certified by the independent third party.



If Contractor has weighed or measured a particular Trainset pursuant to this Article and subsequently makes any change to that Trainset prior to Owner issuing a Certificate of Final Acceptance for that Trainset, Contractor shall both weigh and measure the Trainset again, and obtain the required certifications, pursuant to the process set forth above.

Though Owner is not required to be present for the weighings and measurements (and any associated tests) described in this Article, to enable Owner to be present, Contractor shall give Owner a seven-day written notice of a weighing or measurement that includes the time and location for the weighing or measurement (and any associated tests).

8.8 Obligation to Uncover Work

For each Fleet, at all times before Fleet Acceptance, Contractor shall remove or uncover any part of the Work as directed by Owner. After inspection by Owner and any other persons designated by Owner, Contractor shall properly restore the Work to the standard required by the Contract. If the Work exposed or examined is not in conformance with the requirements of the Contract, then uncovering, removing and restoring the Work and recovery of any Delay occasioned thereby shall be at Contractor's expense and Contractor shall not be entitled to a time extension. Furthermore, any Work done or materials used without notice to and opportunity for prior inspection by Owner as provided in the Contract may be ordered uncovered, removed or restored at Contractor's expense and without a time extension, even if the Work proves acceptable after uncovering. Except with respect to Work done or materials used as described in the foregoing sentence, if Work exposed or examined under this Article 8.8 is in conformance with the requirements of the Contract, then any Delay resulting from uncovering, removing and restoring Work shall be considered an Owner Delay, and Contractor shall be entitled to a Change Order for the cost of such efforts and recovery of any Delay occasioned thereby, subject to the provisions of Article 14.

9. ACCEPTANCE

9.1 Issuance of Certificate of Acceptance for Preliminary Submittals

If requested in writing by Contractor, Owner shall issue a Certificate of Acceptance for Preliminary Submittals upon Owner's determination that Contractor has satisfied all of the conditions for commencement of the Work set forth in Article 5.7.

9.2 Issuance of Certificate of Acceptance for Baseline Program and PMP

If requested in writing by Contractor, Owner shall issue a Certificate of Acceptance for Baseline Program and PMP upon Owner's determination that Contractor has satisfied the following conditions:

- (a) Owner has approved the Baseline Program, as described in Article 4.4; and
- (b) Owner has approved the first tier of the PMP, as described in Article 19.

9.3 Issuance of Certificate of Acceptance for Driving Simulator

If requested in writing by Contractor, Owner shall issue a Certificate of Acceptance for Driving Simulator upon Owner's determination that Contractor has satisfied the following conditions:



- (a) Owner has approved the Operator Procedures and Operator Training Plan; and
- (b) Owner has approved the Driving Simulator.

9.4 Issuance of Certificate of Acceptance for Maintenance Training Program and the Maintenance Plan

If requested in writing by Contractor, Owner shall issue a Certificate of Acceptance for the Maintenance Training Program and the Maintenance Plan upon Owner's determination that Contractor has submitted, and Owner has approved the Maintenance Training Program and the Maintenance Plan.

9.5 Issuance of Certificate of Provisional Acceptance of Trainsets

If requested in writing by Contractor, Owner shall issue a Certificate of Provisional Acceptance for a Trainset upon Owner's determination that Contractor has satisfied the following conditions:

- (a) All of the test and inspections contained in the Testing and Commissioning Program have been successfully completed and the results have been submitted to Owner;
- (b) Contractor has demonstrated and certified that the Trainset has been manufactured and tested to the latest approved configuration under the Configuration Management Plan;
- (c) Contractor certifies that the Trainset meets or exceeds all Contract requirements;
- (d) Contractor certifies that the Trainset can be safely operated on the Test Track for any required tests (using Contractor-provided drivers);
- (e) Contractor certifies that all Governmental Approvals that are required for Trainset operations are obtained and will be maintained in full force and effect; and
- (f) For the first Trainset to receive a Certificate of Provisional Acceptance as part of any Fleet, Contractor has received:
 - (i) the Certificate of Acceptance for Driving Simulator under Article 9.3; and
 - (ii) the Certificate of Acceptance for Maintenance Training Program and the Maintenance Plan under Article 9.4; or

For all subsequent Trainsets, Contractor has submitted to Owner any needed updates or corrections to the deliverables covered by these two certificates.

Any submittals for the Certificate of Provisional Acceptance shall be in a form reasonably acceptable to Owner. Owner shall, after consulting with Contractor, within 15 Working Days after the date of the written request for this certificate:

- (y) Issue to Contractor the Certificate of Provisional Acceptance; or
- (z) Give notice in writing to Contractor specifying all the Work which, Owner determines is required to be completed by Contractor before Owner will issues such certificate.



In the event there are outstanding items of Work pertaining to a particular Trainset that would prevent Contractor's satisfaction of one or more of the conditions of Provisional Acceptance above, Owner may, in its sole discretion, issue an interim Certificate of Provisional Acceptance for that Trainset for the sole purpose of allowing Contractor to perform tests on the Test Track, subject to written agreement by Owner and Contractor on the following: (i) a comprehensive list of the outstanding items of Work, which details the nature of the Work; (ii) a description of the impact of the outstanding Work on the performance and safety of the Trainset, and any applicable mitigation measures; and (iii) Contractor's plan, complete with schedule, to complete the outstanding items of Work. For the avoidance of doubt, an interim certificate does not act like an acceptance in any other way, including for the purposes of payment and meeting deadlines.

9.6 Issuance of Certificate of Conditional Acceptance of Trainsets

If requested in writing by Contractor, Owner shall issue a Certificate of Conditional Acceptance for a Trainset upon Owner's determination that Contractor has satisfied the following conditions:

- (a) Contractor certifies that all requirements for obtaining a Certificate of Provisional Acceptance set forth in Article 9.5 have been and remain fully satisfied;
- (b) Contractor has updated and submitted to Owner the Maintenance Plan and maintenance manuals, and certifies that no further revisions to the plan and manuals are needed to reflect current design and manufacturing of the Trainset;
- (c) Contractor has submitted to Owner the latest updates to the Maintenance Training Plan and maintenance training manuals, and certifies that no further revisions to the plan and manuals are needed to reflect current design and manufacturing of the Trainset; and
- (d) Contractor has submitted to Owner the latest updates to the Operator Procedures and Operator Training Plan, and certifies that no further revisions to the plan and manuals are needed to reflect current design and manufacturing of the Trainset;
- (e) Contractor has delivered and placed into service a fully functional MMIS; and
- (f) For Prototype Trainsets only, all of the test and inspections contained in the Testing and Commissioning Program for Conditional Acceptance testing of a Prototype Trainset have been successfully completed (using Contractor-provided drivers) and the results submitted to the Owner.

Any submittals for the Certificate of Conditional Acceptance shall be in a form reasonably acceptable to Owner. Owner shall, after consulting with Contractor, within 20 Working Days after the date of delivery of such written request for this certificate:

- (y) Issue to Contractor the Certificate of Conditional Acceptance; or
- (z) Give notice in writing to Contractor specifying all the work which, Owner determines is required to be completed by Contractor before issuance of such certificate.



In the event there are outstanding items of Work pertaining to a particular Trainset that would prevent Contractor's satisfaction of one or more of the conditions of Conditional Acceptance above, Owner may, in its sole discretion, issue an interim Certificate of Conditional Acceptance for that Trainset for the sole purpose of allowing Contractor to perform tests on the Test Track, subject to written agreement by Owner and Contractor on the following: (i) a comprehensive list of the outstanding items of Work, which details the nature of the Work; (ii) a description of the impact of the outstanding Work on the performance and safety of the Trainset, and any applicable mitigation measures; and (iii) Contractor's plan, complete with schedule, to complete the outstanding items of Work. For the avoidance of doubt, an interim certificate does not act like an acceptance in any other way, including for the purposes of payment and meeting deadlines.

9.7 Issuance of Certificate of Final Acceptance of Trainsets

If requested in writing by Contractor, Owner shall issue a Certificate of Final Acceptance for a Trainset upon Owner's determination that Contractor has satisfied the following conditions:

- (a) Contractor has fully satisfied all the conditions for obtaining, and has obtained a Certificate of Provisional Acceptance and a Certificate of Conditional Acceptance for the Trainset at issue, all conditions for obtaining such certificates remain fully satisfied and there are no outstanding items of Work pertaining to the Trainset, including any outstanding issues identified by Contractor as part of provisional or conditional acceptance;
- (b) Contractor has fully satisfied the requirements set forth in Article 8.7 related to the weighing of the Trainset and the measuring of the per-mile net kWh energy usage of the Trainset;
- (c) Contractor certifies that the Trainset is fit for its intended purpose and can safely enter passenger service;
- (d) Contractor certifies that the Trainset can be operated without restrictions;
- (e) Contractor certifies that all Governmental Approvals that are required for Trainset operations have been obtained and will be maintained in full force and effect;
- (f) Contractor certifies that the Trainset has logged 10,000 continuous defect-free miles (using Owner-provided drivers);
- (g) For the first Trainset to receive a Certificate of Final Acceptance for Fleet 2, Contractor has received:
 - (i) a Certificate of Owner-Owned Spares Acceptance; and
 - (ii) a Certificate of Special Tools Acceptance: or

For all subsequent Trainsets under any Fleet, Contractor has submitted to Owner any needed updates or corrections to the deliverables covered by these two certificates;

- (h) Contractor has delivered and Owner has approved all documents and other materials requested by Owner, including but not limited to all bills of material,



sufficient to achieve the passage of title to the applicable Trainset upon Owner's issuance of the Certificate of Final Acceptance, free from all Adverse Rights;

- (i) The chief legal officer of Contractor (or other counsel acceptable to Owner) shall issue to Owner an opinion:
 - (i) To the same effect as the representation contained in Article 9.12; and
 - (ii) That the bill of sale and acknowledgment of receipt delivered to Owner pursuant to the Contract are valid and effective to, and accordingly do, confirm in Owner the absolute ownership of the Trainsets free from all Adverse Rights; and
- (j) For the first Trainset deliverable for each Fleet, Contractor has provided to Owner a properly executed irrevocable letter of credit in conformance with the requirements in Article 6.3.

Any submittals related to the Certificate of Final Acceptance shall be in a form reasonably acceptable to Owner. Owner shall, after consulting with Contractor, within ten Working Days after the date of delivery of the written request for this certificate:

- (y) Issue to Contractor the Certificate of Final Acceptance; or
- (z) Give notice in writing to Contractor specifying all the work which, Owner determines is required to be completed by Contractor before Owner will issue such certificate. Owner will require Contractor to complete the outstanding items of work as soon as practicable having regard to the fact that the railway will be in operation.

In the event there are outstanding items of Work pertaining to a particular Trainset that would prevent Contractor's satisfaction of one or more of the conditions of Final Acceptance above, Owner may, in its sole discretion, issue an interim Certificate of Final Acceptance for that Trainset to put the Trainset into revenue service. Owner may issue an interim Certificate of Final Acceptance unilaterally, without first receiving a request from Contractor. Upon Owner's issuance of an interim Certificate of Final Acceptance, Contractor shall be entitled to invoice Owner for the payments described in Article 10.4.1, however the Warranty Period for a Trainset, as described in Article 12.4, shall not commence until the Trainset achieves Final Acceptance. Contractor shall perform the obligations set forth in Section 13 upon Owner's issuance of a Certificate of interim Final Acceptance.

9.8 Issuance of Certificate of Owner-Owned Spares Acceptance

If requested in writing by Contractor, Owner shall issue a Certificate of Owner-Owned Spares Acceptance for the Owner-Owned Spares required under the Contract for a particular Fleet upon Contractor's satisfaction of the following conditions:

- (a) Contractor has delivered and tendered for acceptance all of the Owner-Owned Spares (based on the most recently updated list of Spares) required for a Fleet at a location in the United States designated by Owner;
- (b) Owner has received the Owner-Owned Spares delivery documentation;
- (c) the Owner-Owned Spares conform with the Contract requirements;



- (d) the Owner-Owned Spares comply with all Applicable Laws and standards; and
- (e) Contractor has delivered all documents and other materials necessary to achieve the passage of title to the Owner-Owned Spares upon Owner's issuance of the Certificate of Owner-Owned Spares Acceptance, free of all Adverse Rights.

9.9 Issuance of Certificate of Fleet Acceptance

If requested in writing by Contractor, Owner shall issue a Certificate of Fleet Acceptance for a particular Fleet upon Contractor's satisfaction of the following conditions:

- (a) All of the test and inspections contained in Article 8 and the Testing and Commissioning Program have been successfully completed and all test results submitted to Owner for all Trainsets in the Fleet;
- (b) The Fleet has been manufactured and tested to the latest approved configuration under the Configuration Management Plan;
- (c) Contractor certifies that the Fleet meets or exceeds the Contract requirements;
- (d) Contractor has fully satisfied all the conditions for obtaining, and has obtained, a Certificate of Provisional Acceptance, a Certificate of Conditional Acceptance, and a Certificate of Final Acceptance for each Trainset within the Fleet and all conditions for obtaining such certificates remain fully satisfied;
- (e) The Fleet has achieved a Mean Time between Service Interruptions (MTBSI) of 4,800 hours;
- (f) Contractor has provided Owner a properly executed irrevocable letter of credit as required by Article 6.3; and
- (g) For Fleet 2, Contractor has received a Certificate of Fleet Acceptance for Fleet 1.

Any submittals for Fleet Acceptance shall be in a form reasonably acceptable to Owner. Owner shall, after consulting with Contractor, within 20 Working Days after the date of delivery of the written request for this certificate:

- (y) Issue to Contractor the Certificate of Fleet Acceptance; or
- (z) Give notice in writing to Contractor specifying all the Work which Owner determines is required to be completed by Contractor before Owner will issue such certificate.

9.10 Issuance of Certificate of Special Tools Acceptance

Contractor shall deliver and tender for acceptance all of the Special Tools for a given Fleet at a location in the United States designated by Owner.

If requested in writing by Contractor, Owner shall issue a Certificate of Special Tools Acceptance upon Contractor's satisfaction of the following conditions:

- (a) Owner has received the Special Tools delivery documentation, including the latest updates to Contractor's Maintenance Plan;



- (b) Contractor certifies that the Special Tools conform with the Contract requirements;
- (c) Contractor certifies that the Special Tools comply with all Applicable Laws and standards; and
- (d) Contractor has delivered all documents and other materials necessary to achieve the passage of title to the Special Tools upon Owner's issuance of the Certificate of Special Tools Acceptance, free of all Adverse Rights.

Contractor shall ensure that sufficient numbers of Owner's staff are trained to operate the Special Tools by the time the Special Tools are delivered pursuant to the Contract. If the Contract is terminated for default under Article 15, Contractor shall arrange at its own cost for the training required to enable the replacement supplier's staff to operate the Special Tools.

9.11 Owner's Issuance and Processing of Certificates of Acceptance

Owner's issuance of a Certificate of Acceptance shall be deemed the successful 100 percent completion by Contractor of the corresponding Milestone, if any, set forth in Schedule 3-A, 3-B or 3-C, as appropriate.

To the extent requested by Contractor, Owner shall not be obligated to process more than two written requests per month for issuance of a Certificate of Acceptance.

9.12 Transfer of Title

Contractor represents that at the time Contractor transfers title in and ownership of each Trainset, Special Tools, Spares or other Work deliverable to Owner, Contractor shall be vested with requisite authority to pass, and covenants that it shall pass, such title and ownership, free of all Adverse Rights. Contractor must do all things necessary to give effect to this transfer of title and ownership and to evidence title and ownership in Owner. Upon Owner request, Contractor shall timely execute and deliver to Owner additional documents certifying that Contractor is transferring title and ownership of each item of Work, free of all Adverse Rights, to Owner.

10. PAYMENT

10.1 Payment for Work

This Article 10 sets forth the method by which Owner will pay Contractor for Contractor's performance of the Work.

10.2 Milestone Payments

Owner shall pay Contractor each Milestone Payment upon Contractor's 100 percent achievement of the Milestone at issue.

Owner shall calculate Milestone Payments by multiplying the Milestone Contract Amount for the Fleet at issue, as escalated pursuant to Article 10.5, by the Milestone Payment Percentage in Schedule 3-A, Schedule 3-B or Schedule 3-C, as applicable, for the applicable Milestone.

If Owner issues a Preliminary Notice for Fleet 6 after the deadline for Owner to issue Preliminary Notice(s) related to Fleets 2 through 6 set forth in Article 3 of the



Signature Document, Owner's payment for Contractor's delivery of Trainsets under Fleet 6 is subject to negotiation.

10.3 Manufacturing Restart Payment

Owner shall make the Manufacturing Restart Payment to Contractor for any order of Fleets 1 through 6 if, on the date Owner issues an NTP for Fleets 1 through 6, Contractor has shut down the production line for the Trainsets for more than 180 consecutive days, including for use by Owner, Amtrak or other projects, provided that (i) Contractor shall not be entitled to such payment if, on the date Owner issues the NTP, Contractor has already received an NTP for a previous Fleet but has not yet started to manufacture Trainsets for that Fleet and (ii) if Owner issues an NTP covering more than one Fleet, Contractor shall only be entitled to one payment of the Manufacturing Restart Payment. Contractor shall not be entitled to the Manufacturing Restart Payment if it has not provided Owner with an updated Baseline Program and the latest updates to the Maintenance Training Plan and maintenance training manuals. The Manufacturing Restart Payment is subject to escalation pursuant to Article 10.5. Contractor may not invoice Owner for a Manufacturing Restart Payment under Article 10.6 until Owner has issued to Contractor an NTP for the corresponding Fleet.

If Owner issues a Preliminary Notice for Fleet 6 after the deadline for Owner to issue Preliminary Notice(s) related to Fleets 2 through 6 set forth in Article 3 of the Signature Document, Owner's payment for the restart of the manufacturing process for any order of Fleet 6 is subject to negotiation.

10.4 Service Period

10.4.1 Service Period Payments

Subject to restrictions set forth in this Article 10.4, Contractor is entitled to invoice Owner for the following payments on a monthly basis during the Overall Trainset Service Period:

- (a) An amount based on the Trainset Incremental Service Payment, as described in Article 10.4.3; and
- (b) The Mileage Incremental Service Payment, as described in Articles 10.4.4.

10.4.2 Escalation of Service Period Payments

Pursuant to Article 10.5, Contractor shall provide Owner with estimates of the escalated amounts of the Trainset Incremental Service Payment and the Mileage Incremental Service Payment. Once Owner approves these escalated amounts, the Parties shall use the escalated amounts to calculate the monthly payments described in this Article 10.4.

10.4.3 Trainset Incremental Service Payment

The Trainset Incremental Service Payment for a particular month is calculated by multiplying the escalated amount for Trainset Incremental Service Payment 1, 2, 3, 4 or 5 in Attachment B to the Signature Document, as applicable, by the number of Trainsets from Fleets 1-6 in the Trainset Service Period during the month at issue. The applicable



Trainset Incremental Service Payment from Attachment B is determined as follows:

Trainset Incremental Service Payment 1 - 5	No. of Trainsets in Trainset Service Period During the Month
1	Up to 5
2	More than 5 up to 10
3	More than 10 up to 15
4	More than 15 up to 20
5	More than 20

If a Trainset from Fleets 1-6 was only in the Trainset Service Period for a portion of the month at issue (due to the Trainset Service Period for that Trainset either commencing or terminating that month), that Trainset is counted toward the number of Trainsets in the Trainset Service Period during the month at issue, but the Trainset Incremental Service Payment for that Trainset will only include payment for the portion of the month the Trainset was in the Trainset Service Period.

Contractor's entitlement to the Trainset Incremental Service Payment for a Trainset on any given month shall be reduced on a pro-rata basis for any day that month that the Trainset was either (a) retired by Owner pursuant to Article 13.8 or (b) in Owner's reasonable determination, the Trainset was inoperable or unfit for safe and efficient operation in regular service, including for Contractor's failure to meet its obligations under required programs, plans and manuals (provided there is no reduction if the Trainset was scheduled to be unavailable per the Maintenance Plan).

10.4.4 Mileage Incremental Service Payment

The Mileage Incremental Service Payment for a particular month is calculated by multiplying the amount for the Mileage Incremental Service Payment in Attachment B to the Signature Document (as escalated) by the number of actual miles travelled by the Trainsets from Fleets 1-6 in the Trainset Service Period during the month at issue. If a Trainset from Fleets 1-6 was only in the Trainset Service Period for a portion of the month at issue (due to the Trainset Service Period for that Trainset either commencing or terminating that month), then the Mileage Incremental Service Payment shall only include actual miles travelled by that Trainset during the portion of the month the Trainset was in the Trainset Service Period.

10.5 Escalation

To the extent paid or exercised by Owner, the Milestone Contract Amount for Fleet 1 and Fleet 2, Options Unit Prices for Fleets 3-6, Manufacturing Restart Payments, Trainset Incremental Service Payments and Mileage Incremental Service Payments, liquidated damage amounts described in Articles 11.1 to 11.4, and the prices in Attachment H to the Signature Document for Owner-Owned Spares ordered under Article 13.5 shall be escalated pursuant to Schedule 4. Contractor shall provide estimates of these escalated amounts for Owner review and approval by the following deadlines:



- (a) Milestone Contract Amount for Fleet 1 and Fleet 2 – Due within five Working Days of Owner's issuance of a Preliminary Notice for Fleet 1 or Fleet 2, as applicable, under Article 5.2;
- (b) Options Unit Prices for Fleets 3-6 – Due within five Working Days of Owner's issuance of Preliminary Notice for Fleet 3, Fleet 4, Fleet 5 or Fleet 6 as applicable, under Article 5.2;
- (c) Manufacturing Restart Payment – Due within five Working Days of Owner's issuance of Preliminary Notice for a Fleet under Article 5.2;
- (d) Trainset Incremental Service Payments and Mileage Incremental Service Payments - Due annually within five Working Days of June 30th until the conclusion of the Trainset Service Period;
- (e) Liquidated damage amounts set forth in Articles 11.1, Article 11.2, Article 11.3 and Schedule 6 – Due annually within five Working Days of June 30th;
- (f) Attachment H prices for Owner-Owned Spares ordered under Article 13.5 – Due within five Working Days of Owner's issuance of a Directive Letter under Article 13.5 requesting additional Owner-Owned Spares.

Owner shall approve the escalated amounts submitted by Contractor once Owner has reviewed whether Contractor accurately applied the formulas set forth in Schedule 4. Owner shall respond to Contractor in writing with the approval or any comments requiring re-submission of the escalated amounts prior to Owner approval.

If Owner and Contractor disagree regarding any of the escalated amounts submitted by Contractor, Owner and Contractor will use the calculation Owner believes is correct. Contractor retains the right to dispute Owner's decision, but must proceed while the dispute is being resolved in accordance with the procedure set forth in Article 29.

10.6 Invoicing Requirements

Contractor shall invoice Owner by submitting an original invoice, along with supporting documentation, to Owner. Each invoice shall be submitted electronically and in hardcopy in a form approved by Owner. Invoices may be submitted to Owner no more frequently than once per month. Each invoice shall contain:

- (a) A certificate by Contractor's Project Manager that all amounts being requested are true and correct and the Work is completed per the Contract;
- (b) Any monthly progress reports due pursuant to Article 21;
- (c) Conditional lien releases from each first-tier Subcontractor and Subcontractors of any tier with a contract value greater than \$5 million;
- (d) Evidence acceptable to Owner that payments have been made to each Subcontractor;
- (e) For payment of a Milestone Payment, an executed Certificate of Acceptance that corresponds to that Milestone Payment; and



- (f) Any other information necessary to demonstrate entitlement to payment as determined by Owner.

10.7 Payment of Invoices

Owner shall pay all undisputed invoices within 45 days after receipt of an invoice meeting the criteria set forth herein. Owner may withhold payment of particular charges that Owner disputes in good faith, and in that case Owner shall advise Contractor, in writing, of the nature of the dispute and, at Contractor's request, the Parties shall immediately commence resolution of the issue in accordance with Article 29.

10.8 Final Payment

Owner shall pay the final amounts due Contractor under the Contract after completion and acceptance of all Work, and submission to Owner of a compliant invoice, including an executed release of all claims against Owner and all other documentation required by Owner. As a condition to final payment, Contractor shall have prepared and Owner shall have approved a final invoice as follows:

- 10.8.1** Contractor shall prepare and submit to Owner a proposed final invoice showing the proposed total amount due Contractor. In addition to meeting all other requirements for invoices hereunder, the final invoice shall list all outstanding claims, stating the amount at issue associated with each such claim. The final invoice package shall include complete and legally effective releases complying with the requirements in Article 10.8.5 and that are otherwise satisfactory in form and content to Owner. Prior applications and payments shall be subject to correction in the proposed final invoice. Claims filed concurrently with the final invoice must be otherwise timely and meet all requirements hereunder.
- 10.8.2** Owner will review Contractor's proposed final invoice, and changes or corrections will be forwarded to Contractor for incorporation and resubmission. If no changes or corrections are required, Owner will approve the final invoice.
- 10.8.3** Notwithstanding anything to the contrary in this Article 10, if the final approved invoice shows no outstanding or pending claims, liens or stop notices, and provided that no claim, lien or stop notice is thereafter filed, Owner will pay the entire sum found due on the approved final invoice no later than 45 days after Owner's receipt of the approved final invoice.
- 10.8.4** Notwithstanding anything to the contrary in this Article 10, if the final approved invoice lists any outstanding claims, liens or stop notices, or if any claim, lien or stop notice is thereafter filed, Owner will pay the entire sum found due on the approved final invoice no later than 45 days after Owner's receipt of the final approved invoice, provided Owner may withhold from payment an amount not to exceed 150 percent of any outstanding claims, liens or stop notices plus 150 percent of any amount in dispute between Owner and Contractor, pending resolution of such matters.
- 10.8.5** The executed release from Contractor shall be from any and all claims arising from the Work as represented in the Contract, and shall release and waive any claims against Owner and its Board, officers, agents and



employees, excluding only those matters identified in any claim listed as outstanding in the final invoice. The release shall be accompanied by an affidavit from Contractor certifying that:

- (a) It has resolved any claims made by Subcontractors and others against Contractor or the Project;
- (b) It has no reason to believe that any Person has a valid claim against Contractor or the Project that has not been communicated in writing by Contractor to Owner as of the date of the certificate; and
- (c) All guaranties and warranties are in full force and effect.

The release and the affidavit shall survive final payment.

10.9 Deductions

Owner, in its sole discretion, may deduct the following from any payments due Contractor under any contract with Contractor, including the Contract, or from any sums Owner has retained from Contractor, with Contractor being responsible for any deficiency:

- (a) Any liquidated damages owed to Owner pursuant to Article 11;
- (b) Any sums expended by Owner in performing any of Contractor's obligations under the Contract which Contractor has failed to perform; and
- (c) Any other sums that Owner is entitled to recover from Contractor.

The failure by Owner to deduct any of these sums from a payment shall not constitute a waiver of Owner's right to such sums.

10.10 Owner Liability for Interest on Late Payments

Owner shall not be liable for interest on any late or delayed payment caused by any claim or dispute, any failure to provide supporting documentation or other information required with Contractor's invoice or as a precondition to payment under the Contract, or due to any payment Owner has a right to withhold under the Contract.

10.11 Interest on Contractor Indebtedness

Notwithstanding any other clause of this Contract, unless otherwise required by Applicable Law, all amounts that become payable by Contractor to Owner under this Contract shall bear simple interest from the date due until paid unless paid within 30 days of becoming due. Unless otherwise required by Applicable Law, the interest rate shall be the interest rate established by the Secretary of the Treasury as provided in Section 12 of the Contract Disputes Act of 1978 (Pub. L. 95-563, 92 Stat. 2383), which is applicable to the period in which the amount becomes due, as provided in this clause, and then at the rate applicable for each 6-month period as fixed by the Secretary until the amount is paid. In no event shall the interest charged or payable hereunder exceed that allowable under Applicable Law. Amounts shall be due at the earliest of the following dates:

- (a) The date fixed under this Contract;



- (b) The date of the first written demand for payment consistent with this Contract, including any demand resulting from a default termination; or
- (c) The date Owner transmits to Contractor a proposed Change Order to confirm completed negotiations establishing the amount of debt (unless a later date is set forth therein) if this Contract provides for revision of prices, the date of written notice to Contractor stating the amount of refund payable in connection with a pricing proposal or a negotiated pricing agreement not confirmed by Contract modification.

11. LIQUIDATED DAMAGES

11.1 Liquidated Damages for Delay in Trainset Final Acceptance

If Contractor fails to obtain a Certificate of Final Acceptance for any Trainset within a Fleet by the Trainset Acceptance Deadline for that Fleet, Contractor shall pay to Owner the following amounts of liquidated damages:

- (a) \$12,000 per day, per Trainset, for up to 90 days of delay;
- (b) \$20,000 per day, per Trainset, for between 91 and 180 days of delay; and
- (c) \$38,000 per day, per Trainset, for beyond 180 days of delay.

Contractor's liability for the liquidated damages described in this Article 11.1 shall not exceed 10% of the escalated Milestone Contract Amount for the Fleet at issue.

- 11.2** In the event Contractor elects to replace any Key Personnel without Owner's prior written consent, as required by Article 17.5, Contractor shall pay to Owner the specified liquidated damages for each such individual replaced during the time period indicated below:

First Year after NTP:	\$1,000,000
Second Year after NTP:	\$500,000
Third Year after NTP:	\$100,000
Remaining period of Contract:	\$50,000

11.3 Liquidated Damages for Failure to Meet Whole Life Cost Commitments

If Contractor fails to meet the commitments set forth in Attachment J to the Signature Document, Contractor shall pay to Owner the liquidated damages set forth for such failures in this Article 11.3.

11.3.1 Weight Commitments

For each Trainset that receives a Certificate of Final Acceptance, if one or both of the final certified axle load and final certified unsprung axle load weights for that Trainset (determined pursuant to the process described in this Article) exceed the corresponding weight commitments in Attachment J to the Signature Document, Contractor shall, as a one-time payment to Owner, pay the following specified liquidated damages:

- (a) Axle load weight - \$650,000 per tonne, or part thereof on a pro rata basis, for the amount the final certified weight exceeds the weight commitment; and



- (b) Unsprung axle load weight - \$6,500,000 per tonne, or part thereof on a pro rata basis, for the amount the final certified weight exceeds the weight commitment.

Contractor's liability for the liquidated damages described in this Article 11.3.1 shall not exceed \$100,000,000 per Trainset.

11.3.2 Energy Efficiency Commitments

For each Trainset that receives a Certificate of Final Acceptance, if the final certified measurement for that Trainset (determined pursuant to the process described in this Article) exceeds the per-mile net kWh energy usage commitment in Attachment J to the Signature Document, Contractor shall, as a one-time payment to Owner, pay liquidated damages in an amount equal to \$700,000 for every per-mile kWh, or part thereof on a pro rata basis, that the final per-mile kWh energy usage exceeds the commitment in Attachment J to the Signature Document.

Contractor's liability for the liquidated damages described in this Article 11.3.2 shall not exceed \$100,000,000 per Trainset.

11.3.3 Maintenance Hours Commitments

For each Trainset, at the end of every year of the Trainset Service Period for that Trainset, if the maintenance hours for that Trainset during the prior year exceed the "Maintenance Hours" commitment in Attachment J to the Signature Document, Contractor shall pay \$[To be provided] as liquidated damages for each hour of maintenance, or part thereof, that exceeds the commitment. Any maintenance during the applicable year of the Trainset Service Period required solely as a result of (a) the failure of the Maintainer to correctly perform its duties or (b) damage caused by third parties, shall not count toward the average monthly maintenance hours.

11.3.4 Trainset Seats Commitments

For each Trainset that receives a Certificate of Final Acceptance, if the number of seats in the Trainset is below the number of seats Contractor committed to provide in Attachment J to the Signature Document, Contractor shall, as a one-time payment to Owner, pay liquidated damages in an amount equal to \$2,200,000. This Article does not modify the minimum number of seats per Trainset Contractor is required to provide per Trainset as set forth in Article 4.4.

11.4 Liquidated Damages for Failure to Meet Performance Standards

If Contractor fails to meet the Performance Standards, Contractor shall pay to Owner the liquidated damages set forth for such failures in Schedule 6.

11.5 Escalation of Liquidated Damages Amounts

Pursuant to Article 10.5, Contractor shall provide Owner with estimates of each of the liquidated damage amounts set forth in Article 11.1, Article 11.2, Article 11.3 and Schedule 6. Once Owner approves these escalated amounts, the Parties shall use the escalated amounts to calculate the liquidated damages, if any, paid by Contractor under Articles 11.1, 11.2, 11.3 and 11.4. As these amounts are escalated annually, each annual adjustment approved by Owner shall supersede all previously approved escalated liquidated damage amounts.



11.6 Process for Payment of Liquidated Damages

Liquidated damages payable by Contractor pursuant to this Article 11 may be retained by Owner from, and may be offset by Owner against, monies due or to become due to Contractor and, if none, or if the remaining monies to become due are less than the liquidated damages, Contractor agrees to pay to Owner each amount that has become due as liquidated damages, and has not been retained by Owner, within 30 days after the date on which such amount became due.

11.7 Justification for Liquidated Damages

The Parties have agreed that Owner shall be damaged in the event that Contractor fails to do the following: (i) obtain a Certificate of Final Acceptance for any Trainset within a Fleet by the Trainset Acceptance Deadline for that Fleet; (ii) use approved Key Personnel; (iii) meet the whole life cycle cost commitments set forth in Attachment J to the Signature Document; or (iv) meet the Performance Standards. The Parties further agree that (a) the damages to Owner and the public that would result from such delay or failures would include, but not be limited to, loss of revenues resulting from the loss of both current and potential ridership, increased project and personnel costs, additional maintenance costs and additional costs resulting from the use of replacement equipment, and (b) the extent of such damages would be uncertain in amount and very difficult to ascertain. Accordingly, the Parties have agreed to establish the liquidated damages set forth in this Article 11 and agree that these damages do not constitute a penalty but rather a reasonable prediction of portions of damages Owner would incur as a result of such delays and failures. Contractor acknowledges and agrees that such liquidated damages are intended to compensate Owner solely for the delays and failures described in this Article 11, and shall not excuse Contractor from liability for any other breach of Contract requirements, including any failure of the Work to conform to applicable requirements. The remedies provided for by this Article 11 are cumulative with and in addition to all other rights Owner has hereunder and all other remedies to which Owner is entitled at law or in equity with respect to the facts, circumstances, events or occurrences described in Articles 11.1, 11.2, 11.3 and 11.4.

12. WARRANTY

- 12.1** For the Warranty Periods, Contractor covenants and warrants to Owner that Contractor shall perform the Work in accordance with the requirements set forth in the Contract, including but not limited to Article 3.12. If required by Owner, Contractor shall furnish evidence satisfactory to Owner as to the kind and quality of components, materials and related equipment and accessories provided by Contractor under the Contract.
- 12.2** Contractor also covenants and warrants that all electric, electronic and mechanical systems incorporated in the Trainsets shall be integrated so that they operate without any electric, electronic, magnetic, mechanical, chemical or other interference between them.
- 12.3** The warranties specified under this Article 12 apply whether the Trainsets, Special Tools, Spares and related equipment and accessories, and systems concerned are supplied by Contractor or its Subcontractors at any tier. The warranties shall run to Owner, its successors and assigns, and the remedies provided under this Article 12 are cumulative and not exclusive to other remedies in the Contract.



- 12.4** The warranties specified under this Article 12 shall commence for a given Trainset upon the issuance of a Certificate of Final Acceptance for that Trainset. The Warranty Period for a Trainset component shall be defined as follows:

<u>Component</u>	<u>Length of Warranty Period</u>
a. Car Body Structure	30 years
b. Truck Frames	20 years
c. All other elements of the Work, including components and related equipment and accessories and systems.	5 years

- 12.5** Upon occurrence of a breach of warranty, Contractor shall provide a written report on the scope of any repair or replacement warranty work necessary and plan an optimum manner of accomplishing such work (taking into account out-of-service time, skill levels, space restraints, cost and other relevant factors), which must be approved by Owner. If Owner agrees to perform or contract with a third-party to perform repair or replacement warranty work, Contractor shall be responsible for ensuring the correction of each breach of warranty and shall reimburse Owner for costs, (including overhead and profit) and expenses incurred in connection with such work. If it is agreed that Contractor shall take action to remedy the breach, such action shall be undertaken promptly and at Contractor's own cost and expense and without cost or expense to Owner. If Contractor fails to promptly remedy the breach, Owner may take such actions as it deems appropriate to remedy the breach and Contractor agrees to reimburse Owner for all costs and expenses, (including profit and overhead) incurred thereby.
- 12.6** If, at any time prior to the expiration of the Warranty Period for a Trainset component, the cumulative defects or failures of any kind in identical components or systems within the Trainsets serving substantially similar functions exceed 10 percent, Contractor shall, at its own cost, perform a failure analysis to determine the cause and frequency of the defects or failures and submit the results of this analysis to Owner within 30 days from the date Contractor becomes aware of each failure. Type and process of this failure analysis and conclusions shall be approved by Owner prior to determining suitable corrective action. Once Contractor has received written approval of the failure analysis from Owner, Contractor shall have 21 days to submit to Owner for approval a "Modification Program" with respect to all affected components or systems in all Trainsets. The Modification Program shall reflect the results of the approved failure analysis and ensure that all applicable components or systems are no longer defective or at risk of defect or failure, and are otherwise cured, at no additional cost to Owner. The Modification Program shall include a schedule for curing the applicable defects or failures. Once approved by Owner, Contractor shall diligently implement the Modification Program pursuant to the schedule set forth in the Program. Owner shall give Contractor in writing within five Working Days a notification of such defects or failures as they are identified.
- 12.7** In the event that any warranty work under this Article 12 requires the removal of major components or assemblies for the purpose of repairs or modifications, and such removals, in Owner's reasonable discretion, render any Trainset inoperable or unfit for safe and efficient operation in passenger service, Contractor shall furnish an adequate number of Warranty Spares for the temporary use by Owner within 24 hours of notification by Owner so as to avoid downtime of the affected Trainset while repairs or modifications are being done.



- 12.8** Contractor shall maintain a sufficient quantity of Warranty Spares to enable it to provide for warranty parts replacement within 24 hours of notification by Owner of a defective part. During the Warranty Period (including any extensions), Contractor shall be subject to liquidated damages for non-performance as set forth in Article 11.4 to the extent Contractor is unable to provide warranty parts within 24 hours of receiving such a notice.
- 12.9** After one or more of the Trainsets have been accepted, if, during any five-year Warranty Period, three or more Trainsets are, in Owner's reasonable discretion, inoperable or unfit for safe and efficient operation in regular service during any 30 day period in breach of Contractor's warranty obligations, as determined by Owner in its sole discretion, Owner may require Contractor, within 30 days after receipt of written notice from Owner, to submit a Contractor's proposal for a "Remanufacturing Program" to accomplish the necessary repairs, replacements or modifications at no additional cost to Owner with the least disruption to or interference with scheduled passenger service. Such Remanufacturing Program shall consist of, but not be limited to, at least one of the following, in Owner's discretion:
- (a) Arrangement by Contractor to have the necessary repairs, replacements or modifications performed by Owner;
 - (b) Arrangement by Contractor for the use of suitable Facilities, on Owner property (if agreement can be reached on its availability) or in the vicinity thereof, to be manned by Contractor's personnel to perform the necessary repairs, replacements or modifications; or
 - (c) Arrangement by Contractor to have the necessary repairs, replacements or modifications performed by qualified mutually agreed upon third-parties located in the vicinity of Owner property.
- 12.10** Except as otherwise provided in Article 12.11, all materials, parts, and equipment which are repaired or which replace items which were found to have had defects in design, material or workmanship shall be warranted for: (a) the remainder of the applicable Warranty Period; (b) one year from the completion of testing of the warranty work; (c) five years from the completion of testing of the warranty work if the repair or replacement is performed under a Modification Program described in Article 12.6; or (d) one year from the date on which the applicable Trainset is returned to service, whichever provides the longest Warranty Period for the applicable item.
- 12.11** Notwithstanding, and in addition to, any other warranty period extensions under this Article 12, in the event that a Trainset is out of service due to issues covered by warranty for more than 30 cumulative days, then the Warranty Period for that Trainset (and all prior warranty extensions described in this Article 12) shall be extended on a day-by-day basis for the amount of time that the Trainset is out of service. For example, if a Trainset is out of service for six cumulative months due to issues covered by warranty, then the 5-year general warranty set forth in Article 12.4 and all other warranties shall be extended for six months.
- 12.12** Contractor shall obtain from all Subcontractors, including manufacturers and suppliers, warranties that would be given in normal commercial practice, require all such warranties to be executed, in writing, for the benefit of Owner or Owner's assignee and enforce all warranties for the benefit of Owner for the benefit of Owner or Owner's assignee, if directed by Owner or Owner's assignee. In no case whatsoever shall other warranties decrease the warranty provisions specified in the



Contract. All such warranties from Subcontractors, including manufacturers and suppliers, shall:

- Be written so as to survive all inspections and tests by Owner and Contractor; and
- Run directly to be enforceable by Contractor and/or Owner, any assignee, by Owner and their respective successors and assigns.

12.13 Contractor hereby assigns to Owner all of Contractor's rights and interest in all warranties that are received by Contractor from any of its Subcontractors, including manufacturers and suppliers. All such warranties shall survive Final Payment and termination of the Contract if the stated warranty period extends beyond Final Payment and termination of the Contract. The existence of any warranties which run to Contractor from any of its Subcontractors covering components, materials and/or related equipment and accessories shall not relieve Contractor of its obligation to repair or replace any of the material and/or equipment due to a breach of warranty. Subject to Owner's assignment and delegation rights under Article 31, Owner shall not be required to rely on another party for fulfillment of the obligations in this Article 12.

12.14 At any time while there is a five-year Warranty Period in effect under Article 12.4, item (c), Contractor shall maintain field engineers at the designated Owner sites to correct faults and defects that may be encountered. These field service personnel shall be supervised and guided by a Field Service Supervisor who shall provide guidance of such warranty related activities.

12.15 During the Warranty Period, Contractor shall keep a log of all faults and defects, and of any adjustments and changes made in order to remedy such faults and defects. Contractor shall enter, track and manage this log in the MMIS system. Contractor shall submit to Owner a report of warranty work performed during preceding week. Contractor shall track defects and submit a monthly report including all failures and defective items with running totals on a monthly and cumulative basis.

12.16 Owner shall give Contractor written notices of observed defects or failures. Unless otherwise directed in said notices, Contractor shall commence effort to correct the work at the time specified by Owner but in no event later than 24 hours following notification by Owner of the defect or failure. Contractor shall diligently pursue such corrective work to completion. To prevent delays and disruption to Owner's operations, Owner shall have the right, when practical and feasible in its opinion, after receiving written comments from Contractor, to continue use of any such Trainset, goods, supplies and subsystems deemed defective or unsatisfactory, until such equipment can be taken out of service pursuant to the corrective work hereby undertaken by Contractor.

12.17 In the event a defect or failure which, in the opinion of Owner, constitutes an emergency that could jeopardize or impair Trainset operations, including passenger service, then in that event Owner shall provide Contractor both verbal and written notice thereof and Contractor shall commence corrective work within 24 hours of any working day after receipt of Owner's Incident Report/Warranty Claim. Nothing herein shall be construed as preventing Owner's forces from immediately commencing corrective work, provided all such corrective work is performed in accordance with the maintenance manuals furnished by Contractor as part of the Maintenance Plan. Contractor shall reimburse Owner for costs of labor, fringe benefits and overhead at the prevailing rates when the work is performed. Owner shall advise Contractor of the current rates. Any corrective work by Owner's forces shall not be construed to



invalidate Contractor's warranties and other provisions contained in this Article 12. The corrective work done by Owner shall be subjected to Contractor's approval.

Under such emergency conditions, Contractor, with approval of Owner, may utilize Spares from Owner's Owner-Owned Spares inventory, provided Contractor agrees to replace each and every Spare so used under terms within the time period to be prescribed by Owner. Contractor shall bear full responsibility for all costs and delays resulting from Contractor's use of Spares from Owner's Owner-Owned Spares inventory. Contractor shall submit a list for Owner's review of all parts and quantities being proposed to support warranty compliance during this period. The list shall be submitted to Owner no later than delivery of the first Trainset. At the end of the warranty period, Contractor shall permit Owner to purchase, at a reasonable cost, any quantity up to all of Contractor's Warranty Spares and related materials.

The warranty provisions described in this Article 12 shall be applicable to each Spare replaced by Contractor from Owner-Owned Spares used pursuant to this Article 12.17.

- 12.18** Contractor's representatives shall be qualified field engineers, knowledgeable in the repair and maintenance of equipment covered under the Contract. The field engineers shall be available on 24 hours advance notice until the expiration of the Warranty Period for all equipment covered under the Contract and the completion of all warranty work on equipment covered under the Contract. The field engineers shall follow up on all warranty claims and shall assist Owner in the resolution of any maintenance problems. Should any warranty claim be contested by Contractor, a joint inspection shall be made by Contractor and Owner, with a written report made by Contractor to Owner concerning Contractor's proposal to resolve the claim. Owner shall approve the proposal and, once approved, Contractor shall proceed in correcting the defective work according to the timetable set forth in Contractor's approved proposal. If Owner does not approve the proposal, Contractor shall proceed in accordance with Owner's instructions and the matter shall be treated as a contract dispute in accordance with Article 29.
- 12.19** Replacement parts and repairs provided pursuant to corrective work hereunder shall be subject to prior approval of Owner and shall be tendered and performed in the same manner and extent as items originally delivered. Corrective work shall be performed at up to three Owner maintenance sites. Any warranty work shall be accomplished with a minimum of disruption to Owner operations and its Maintenance Facilities. Owner shall provide the Maintenance Facilities free of charge and provide full access to Contractor whenever corrective work is being performed. Owner shall make every reasonable effort to make such Facilities and railcars available to Contractor, consistent with Owner's operational requirements. Contractor shall bear the cost of corrective work including necessary disassembly transportation, re-assembly, repair of, and replacement of the defective goods, supplies, subsystems, parts, equipment and work.
- 12.20** In the event Contractor is unable or fails within the time prescribed to commence and diligently pursue and complete the corrective work described in Article 12.19, Owner is by this provision authorized by Contractor, at the option of Owner and upon written notice to Contractor to contract with a mutually agreed third-party or to use its own forces for the performance of the warranty work. The costs of such work may be deducted from monies due, or to become due Contractor. If no monies are then owed the Contractor, Owner shall invoice Contractor for such costs, and Contractor shall pay the invoice within 30 days after its receipt. Contractor hereby agrees to reimburse Owner for all costs and expenses in connection with such corrective work.



Owner's performance of this corrective work does not, in any way, limit Owner's ability to pursue remedies against Contractor under the Contract.

12.21 Additional Warranties Relating to Computer Hardware, Software, Etc.

A. Virus Warranty. Contractor represents and warrants that it shall use commercially reasonable efforts to ensure that no viruses or similar items ("viruses") are coded or introduced into any Owner software or computer system used by Owner. Contractor agrees that in the event that a virus is found to have been introduced, Contractor shall take all reasonable action at its own expense to eliminate the virus and reduce the effects of the virus on Owner's operations. Contractor further agrees to cooperate with Owner to mitigate and restore any loss of data or operational efficiency.

B. Disabling Code Warranty. Contractor represents and warrants that it shall not insert any time-bombs, drop-dead or disabling devices, back doors or similar items or invoke any code which could have the effect of disabling or otherwise shutting down any portion of Owner's computer software or system.

12.22 The foregoing warranties set out in this Article 12 are in addition to all rights and remedies provided by Applicable Law or equity and under this Contract, and shall not limit Contractor's liability or responsibility imposed by the Contract or Applicable Law with respect to the Work, including liability for design defects, latent construction defects, strict liability, negligence or fraud, provided, however, that upon expiration of the warranties, Contractor shall have no further liability to Owner hereunder for patent construction defects.

13. TRAINSET SERVICE PERIOD RIGHTS AND OBLIGATIONS

13.1 For the Trainset Service Period for each Trainset, Contractor shall provide Owner or Maintainer, as appropriate, all goods and services needed to maintain the Trainset in proper operating order, including:

- (a) All Scheduled Spares, in the quantities and pursuant to the schedule identified in the Maintenance Plan;
- (b) Any Unscheduled Spares that are not Owner-Owned Spares and that are needed for Contractor to meet Contract requirements (e.g., requirements set forth in the Performance Specification and Performance Standards);
- (c) All Consumable Spares needed for Contractor to meet Contract requirements (e.g., requirements set forth in the Performance Specification and Performance Standards);
- (d) Any audit of Trainset performance or the Maintainer's maintenance activities, and related reports, as described in Article 13.3; and
- (e) All training and technical support required under the Contract, including the technical support described in Article 13.4.

Contractor's provision of the goods and services described in this Article 13.1 shall constitute the Work covered by the Trainset Incremental Service Payments and Mileage Incremental Service Payments.



- 13.2** Owner reserves the right to review and approve or reject, any Spares provided by Contractor under the Contract. Spares subject to high wear or replacement shall be available from the original manufacturer. There shall be no restriction to prevent direct procurement from the original manufacturer of parts by Owner.
- 13.3** Throughout the Trainset Service Period for each Trainset, Contractor shall be required to audit the performance (reliability, maintainability, availability) of the Trainsets, and Maintainer's maintenance activities to ensure that the Maintenance Plan, including the maintenance manuals and the maintenance procedures, are appropriate to meet the design performance specified in the Contract, and that Maintainer is following the Maintenance Plan, including the maintenance manuals and maintenance procedures. Contractor shall update the Maintenance Plan, including the maintenance manual, the maintenance procedures, the Maintenance Training Plan, including the maintenance training manuals, as required based on the results of this audit. From the commencement of the first Trainset Service Period through the end of the Contract term, Contractor shall provide Owner a monthly report with the results of the audit for that month, including a detailed description of any failure by Maintainer to follow these obligations.
- 13.4** Throughout the Trainset Service Period for each Trainset, Contractor shall, upon Maintainer's request, provide Maintainer technical support related to the Trainsets and any Spares.
- 13.5** In addition to the Owner-Owned Spares and Special Tools provided by Contractor for each Fleet pursuant to Article 5 of the Signature Document, Contractor shall, upon receipt of a written order, in the form of a Directive Letter, supply to Owner additional Owner-Owned Spares and Special Tools, with all associated delivery documentation. Contractor's provision of such additional Owner-Owned Spares and Special Tools shall be in accordance with the plans and requirements listed in Article 5 of the Signature Document. Contractor shall deliver the Owner-Owned Spares and Special Tools (and associated delivery documentation) as soon as possible and in no event later than 30 days after Owner issues the Directive Letter, except in the case of items that Contractor has identified cannot be procured within 30 days in the updated list described in Article 4.6.1. Upon delivery, these Owner-Owned Spares and Special Tools are subject to Owner's acceptance. Owner shall pay for such Owner-Owned Spares and Special Tools through the Change Order process for Owner-Directed Changes under Article 14, provided (i) the prices for Special Tools shall be the lowest prices Contractor has charged for other comparable items under similar terms and conditions and (ii) the prices for Owner-Owned Spares shall be the prices set forth in Attachment H to the Signature Document. Upon receipt of a Directive Letter requesting additional Owner-Owned Spare(s), and in accordance with the process set forth in Article 10.5, Contractor shall calculate and submit to Owner in writing escalated Attachment H prices for the Owner-Owned Spares ordered by Owner. Once Owner has approved the escalated amounts, the Parties shall use the escalated amounts to determine compensation in the resulting Change Order executed by the Parties under Article 14.
- 13.6** Spares provided Contractor must be capable of being incorporated into the Trainsets without material changes.
- 13.7** Starting six months before the anticipated commencement of the Overall Trainset Service Period and throughout the Overall Trainset Service Period, Owner shall give Contractor at least six months written notice of any planned increase or decrease to the projected mileage in the Service Plan (as compared to the projected mileage set forth in the Baseline Fleet Mileage Schedule).



- 13.8** Owner, in its sole discretion, has the right to permanently retire any Trainset in the Trainset Service Period. Such retirement shall be effective upon Owner's issuance of a written notice to Contractor regarding the retirement of the Trainset. Contractor shall not be obligated to provide Spares for any Trainsets retired by Owner pursuant to this Article.

14. CHANGES

This Article 14 sets forth the requirements for obtaining all Change Orders under the Contract. Contractor hereby acknowledges and agrees that the Contract Amount constitutes full compensation for performance of all of the Work, subject only to those exceptions specified in this Article 14. Contractor hereby waives the right to make any claim for an extension of the Contract Time or for any monetary compensation in addition to the Contract Amount and any other compensation specified in the Contract, except as set forth in this Article 14. To the extent that any other provision of the Contract expressly provides for a Change Order to be issued, such provision is hereby incorporated into this Article 14.

14.1 Change Orders Generally

A Change Order shall not be effective for any purpose unless executed by Owner. As used herein, execution of a Change Order by Owner shall mean that the Change Order has been fully executed with all required signatures by Owner. Change Orders may be requested by Contractor only pursuant to Article 14.4.

14.2 Directive Letters

Owner may at any time issue a Directive Letter to Contractor in the event of any desired change in the Work or of any dispute between the Parties regarding whether the Work in question is within the original scope of the Work. The Directive Letter will state that it is issued under this Article 14.2, will describe the Work in question and will state the basis for determining compensation. Contractor shall proceed immediately with the Work as directed in the Directive Letter, pending the execution of a formal Change Order (or, if the letter states that the Work is within the original scope of the Work, Contractor shall proceed with the Work as directed but shall have the right pursuant to Article 14.4 to request that Owner issue a Change Order with respect thereto if Contractor believes the work described in the Directive Letter is not included in the Work). Owner's issuance of a Directive Letter shall not be considered evidence that an Owner-Directed Change occurred. The determination whether an Owner-Directed Change in fact occurred shall be based on an analysis of the original Contract requirements and any effect of the Directive Letter on those requirements.

14.3 Owner Changes

14.3.1 Owner-Directed Changes

Owner may, at any time, without notice to the sureties hereunder or the Guarantor, by Directive Letter under Article 14.2 or by a Time and Materials Change Order, make changes to the Work. Such changes to the Work shall be considered Owner-Directed Changes.

Contractor shall proceed immediately with the Work as directed in the Directive Letter or the Time and Materials Change Order. Contractor shall maintain and, upon request, deliver to Owner, contemporaneous records, meeting the requirements of the Time and Materials Change Orders clause (Article 14.13), for all Work performed



that Contractor believes constitutes extra work, until all disputes regarding entitlement or cost of such work are resolved.

Contractor's receipt of a Directive Letter or Time and Materials Change Order from Owner is a condition precedent to Contractor's right to claim that an Owner-Directed Change has occurred, provided that no Directive Letter or Time and Materials Change Order shall be required for alleged Owner-Directed Changes directly attributable to delays caused by bad faith actions, active interference, gross negligence or comparable tortious conduct by Owner.

To the extent Contractor performs any changed or extra work without receiving a Directive Letter (provided that no Directive Letter shall be required for alleged Owner-Directed Changes directly attributable to delays caused by bad faith actions, active interference, gross negligence or comparable tortious conduct by Owner) or Change Order, including a Time and Materials Change Order, executed by Owner, Contractor shall be deemed to have performed such work voluntarily and shall not be entitled to a Change Order in connection therewith, and may be required to remove or otherwise undo such work at its sole cost.

14.3.2 Changes to Design of the Work Ordered by Owner

Except in the case of a Change Order resulting from a change proposed by Contractor (in which case this Article 14.3.3 shall not apply) if, in the opinion of Contractor, a change to the design of the Work contained in a Directive Letter or Time and Materials Change Order could reasonably be expected to prevent or prejudice Contractor from complying with any of its obligations under the Contract, it shall notify Owner. Such notice shall be given in writing as soon as practicable but in no event later than 30 days after receipt of the relevant Directive Letter or Time and Materials Change Order, giving a statement of the reasons for its opinion. Owner may confirm its instructions in writing but until Owner so confirms its instructions they shall be deemed not to have been given.

14.3.3 Owner Right to Request Price Deduction

Owner shall be entitled to a Change Order decreasing the Contract Amount (a) for any circumstance that decreases the cost of the Work, to the extent the Contract expressly states that such circumstance entitles Owner to an adjustment of the Contract Amount, including, but not limited to changes in Applicable Laws as described in Article 14.14 or (b) in the event of an Owner-Directed Change that decreases the cost of the Work. Change Orders are not required to document circumstances where Owner, as contemplated by the Contract, deducts (or offsets) amounts due Owner from monies due, or to become due Contractor, including, but not limited to, liquidated damages or the costs incurred by Owner to correct deficient Work.

14.4 Contractor Right to Request Time Extension and Price Increase

14.4.1 Conditions

Upon Contractor's fulfillment of all applicable Contract requirements and subject to the limitations contained therein, Contractor shall be entitled to a Change Order for a circumstance that increases the Contract Amount or extends the Contract Time only for the following circumstances (and for no other circumstances):

- (a) Owner-Directed Changes, to the extent described in Article 14.3.1;



- (b) Owner Delays;
- (c) a change in one or more Applicable Laws, to the extent provided in Article 14.14;
- (d) Force Majeure Events, to the extent provided in Article 14.15;
- (e) delays, to the extent provided in Article 14.16;
- (f) a suspension of the Work, to the extent provided in Article 14.17;
- (g) material changes to the draft Tier III regulations attached as Schedule 10 to the General Provisions, to the extent provided in Article 14.18;
- (h) Contractor's provision of Unscheduled Spare(s) that are not Owner-Owned Spares and that are needed to fulfill the Contract requirements, to the extent Owner determines, in its reasonable discretion, that Contractor has established the following: (i) the Unscheduled Spare(s) at issue are needed due to damage to an existing part; and (ii) Contractor is not responsible, in whole or in part, for such damage, including due to failures to properly audit or train the Maintainer;
- (i) Issuance of a temporary restraining order or other form of injunction by a court that prohibits prosecution of a material portion of the Work, except to the extent (i) Contractor adopts any design or manufacturing approach that would require revision, modification or amendment to any Governmental Approval already in place for Owner's high speed train network and (ii) the injunction arises out of, related to, or is caused by the negligent or improper act or omission, willful misconduct, recklessness or breach of contract or law by any Contractor-Related Entity.

Contractor shall bear full responsibility for the costs and delays of all other circumstances.

Contractor shall secure all Governmental Approvals required as a result of a Change Order.

14.4.2 Limitation on Contract Amount Increases

Any increase in the Contract Amount allowed hereunder shall exclude:

- (a) Costs caused by breach of Contract or fault or negligence, or act or failure to act of any Contractor-Related Entity.
- (b) Costs that could reasonably have been avoided by Contractor, including by re-sequencing, reallocating, or redeploying its forces to other portions of the Work or to other activities unrelated to the Work (including any additional costs reasonably incurred in connection with such reallocation or redeployment).
- (c) Costs for (i) any rejected Work that failed to meet the requirements of the Contract and (ii) any necessary remedial Work.

14.4.3 Limitation on Contract Time Extensions

Any extension of the Contract Time allowed hereunder shall exclude any delay to the extent that it:



- (a) Did not impact the Critical Path affecting the Contract Time;
- (b) Was due to the fault or negligence, or act or failure to act of any Contractor-Related Entity;
- (c) Could reasonably have been avoided by Contractor, including by re-sequencing, reallocating or redeploying its forces to other portions of the Work (provided that if the request for extension involves an Owner caused delay, Owner shall have agreed, if requested to do so, to reimburse Contractor for its costs incurred, if any, in re-sequencing, reallocating, or redeploying its forces); or
- (d) Was concurrent with any other delay for which Contractor is not entitled to an extension of the Contract Time.

Contractor shall be required to demonstrate to Owner's satisfaction that the change in the Work or other event or situation that is the subject of a Change Order seeking a change in the Contract Time has caused or will result in an identifiable and measurable Delay which has impacted the Critical Path activity affecting the Contract Time.

14.4.4 Limitation on Delay and Disruption Damages

Delay damages shall be compensable hereunder only in the case of Delays to the extent that they entitle Contractor to an extension of the Contract Time and result from the following (and no other Delays):

- (a) An Owner-Directed Change that is the result of a written order designated to be a Directive Letter under Article 14.2;
- (b) A suspension of the Work under Article 14.17; or
- (c) Owner Delay.

Delay damages are limited to additional field office and jobsite overhead costs, including onsite storage costs, incurred by Contractor directly attributable to the Delay of the Contract Time. Home office overhead is excluded from Delay damages and not compensable under the Contract. Before Contractor may obtain any increase in the Contract Amount to compensate for any Delay damages, Contractor shall have demonstrated to Owner's satisfaction that:

- (v) The Baseline Program in fact sets forth a reasonable method for completion of the Work;
- (w) The change in the Work or other event or situation that is the subject of the requested Change Order has caused or will result in an identifiable and measurable Delay and impact the Critical Path affecting the Contract Time;
- (x) The Delay damage was not due to any breach of Contract or fault or negligence, or act or failure to act of any Contractor-Related Entity, and could not reasonably have been avoided by Contractor, including by re-sequencing, reallocating or redeploying its forces to other portions of the Work or other activities unrelated to the Work (subject to reimbursement for additional costs reasonably incurred in connection with such reallocation or redeployment);



- (y) The Delay for which compensation is sought is not concurrent with any other delay for which Contractor is not entitled to Delay damages; and
- (z) Contractor has suffered or will suffer actual costs due to such Delay, each of which costs shall be documented in a manner satisfactory to Owner.

Disruption damages, whether from a single event or continual, multiple or repetitive events, are not allowed or recoverable under the Contract. Disruption damages include costs of (i) rearranging Contractor's Work plan not associated with an extension of the Contract Time and (ii) loss of efficiency, momentum or productivity.

14.5 Delivery of Notice

As a condition precedent to Contractor's right to a Change Order, Contractor shall provide written notice to Owner that includes the following information:

- (a) Date;
- (b) Circumstances entitling Contractor to a Change Order;
- (c) Applicable provision of the Contract expressly contemplating that a Change Order is allowed for such circumstance; and
- (d) A statement providing that Contractor regards the circumstance as allowing a Change Order.

Contractor shall deliver each such notice as promptly as possible after the occurrence of such circumstance. If any such notice is delivered later than 14 days after Contractor first discovered (or should have discovered in the exercise of reasonable prudence) the occurrence of such circumstance, Contractor shall be deemed to have waived the right to collect any and all costs incurred prior to the date of delivery of the written notice, and shall be deemed to have waived the right to seek an extension of the Contract Time with respect to any delay in the Critical Path that accrued prior to the date of delivery of the written notice. Where Owner issues a Directive Letter, this 14 day period shall commence no later than the date Owner issues the Directive Letter.

Except as provided in Article 14.3 and Article 14.4, no circumstance, order, statement or conduct of Owner shall be treated as a change, modification, amendment or entitle Contractor to a Change Order.

Contractor's failure to provide the notice described in this Article 14.5 within 28 days after Contractor first discovered (or should have discovered in the exercise of reasonable prudence) the occurrence of a given circumstance shall preclude Contractor from any relief whatsoever. Such notice shall be deemed delivered only if it fully conforms to the requirements of Article 14 and the Contract.

14.6 Change Order Proposal

14.6.1 Timing of Change Order Proposal Submission

As a condition precedent to Contractor's right to a Change Order, Contractor shall submit to Owner a Change Order Proposal under this Article within 42 days after the furnishing of a written notice under Article 14.5.



14.6.2 Change Order Proposal Content Requirements

The Change Order Proposal shall be prepared in form acceptable to Owner and meet all applicable requirements of the Contract. The Change Order Proposal shall include a narrative justification of the requested relief, specifically referring to the applicable provisions of the Contract that permit a Change Order to be issued and describing the data that establishes the necessary amount of such proposed change. Change Order Proposals totaling \$5,000 or less shall be submitted in the form of a lump sum proposal with, to the satisfaction of Owner, sufficient supporting information to clearly relate elements of cost with specific items of work. For Change Order Proposals in excess of \$5,000, Contractor's claim for equitable adjustment shall be submitted in the form of a lump sum proposal supported with an itemized breakdown of all increases and decreases in the Contract. This itemized breakdown shall, at a minimum, include the items specified in Article 14.9.2. Change Order Proposals shall not include any cost for insurance provided by Owner.

The Change Order Proposal shall include sufficient backup documentation and must outline any cost and time impact to the Contract as the result of the change specified in the Change Order Proposal. This documentation shall include an itemized price breakdown. Unless otherwise directed, the breakdown shall be in sufficient detail to permit an analysis of all material, labor, equipment, Subcontract and overhead costs, as well as profit. Any amount claimed for Subcontracts shall be supported by a similar price breakdown. If the Change Order Proposal includes a request for an extension of the Contract Time, the Change Order Proposal shall include a justification for the proposed extension, including a time impact analysis showing the impact on the Critical Path.

Each Change Order Proposal shall contain a sworn certification in form acceptable to Owner by Contractor (and each Subcontractor, for any Subcontractor involved in the Work or event contemplated by the Change Order) that the Change Order is made in good faith and in accordance with the terms of the Contract, the amount of time and/or compensation requested accurately reflects the appropriate adjustments and includes all known and anticipated impacts that may be incurred as a result of the event giving rise to such proposed change and that Contractor (and each Subcontractor, as applicable) has no reason to believe and does not believe that the factual basis for the Change Order is falsely represented.

Each Change Order Proposal involving Subcontractor Work shall include a sworn certification in form acceptable to Owner stating that Contractor has investigated the basis for the Subcontractor's claims and has determined that all such claims are justified as to entitlement and amount of money and/or time requested and has no reason to believe and does not believe that the factual basis for the Subcontractor's claim is falsely represented. Any Change Order Proposal involving Subcontractor Work shall be considered incomplete if it is not accompanied by such certificate.

If no reasonable Change Order Proposal is submitted by Contractor within the specified time, Contractor shall be deemed to have withdrawn its request for a Change Order under Article 14.4.

14.6.3 Incomplete Change Order Proposals

Each Change Order Proposal provided under this Article shall meet all requirements set forth in this Article, provided that if any such requirements cannot be met due to the nature of the occurrence, Contractor shall provide an incomplete Change Order Proposal, which shall:



- (a) Comply with all requirements capable of being met;
- (b) Include a list of requirements that are not fulfilled together with an explanation reasonably satisfactory to Owner stating why such requirements cannot be met;
- (c) Provide such information regarding projected impact on the Critical Path affecting the Contract Time as is requested by Owner; and
- (d) In all events include sufficient detail to ascertain the basis for the proposed Change Order and for any price increase associated therewith, to the extent such amount is then ascertainable.

14.6.4 Additional Information and Updates

In addition to any other information or details Contractor is required to provide pursuant to this Article, Contractor shall furnish, when requested by Owner, such further information and details as may be required to determine the facts or contentions involved. Contractor agrees that it shall give Owner access to any and all of Contractor's books, records, and other materials relating to the Work, and shall cause its Subcontractors to do the same, so that Owner can investigate the basis for such proposed Change Order. Contractor shall provide Owner with a monthly update to all outstanding incomplete Change Order Proposals, describing the status of all previously unfulfilled requirements and stating any changes in projections previously delivered to Owner, time expenditures to date and time anticipated for completion of the activities for which the time extension is claimed. Failure to provide the above monthly information as required shall prevent Contractor from being compensated for that month for any Change Order Proposal amounts that otherwise may be owed or become owed.

14.6.5 No Change Order Proposals after Final Payment

No Change Order Proposal by Contractor for an equitable adjustment shall be allowed if asserted after final payment under this Contract.

14.7 Importance of Timely Notice

Contractor acknowledges and agrees that, due to the limited availability of funds for the Trainsets and the importance of schedule, timely delivery of notification of requests for Change Orders and updates thereto are of vital importance to Owner. Owner is relying on Contractor to evaluate, promptly upon the occurrence of any circumstance, whether the circumstance will affect schedule or costs and, if so, whether Contractor believes a time extension and/or price increase is required hereunder. If an event or situation occurs that may affect the Contract Amount or the Contract Time, Owner will evaluate the situation and determine whether it wishes to make any changes to the Work so as to bring the Work within Owner's funding and time constraints.

14.8 Waiver

CONTRACTOR HEREBY EXPRESSLY WAIVES ALL RIGHTS TO ASSERT ANY AND ALL CLAIMS BASED ON ANY CHANGE IN THE WORK, DELAY OR ACCELERATION (INCLUDING ANY CHANGE, DELAY, SUSPENSION OR ACCELERATION WHICH, BUT FOR THE EXPRESS TERMS OF THE CONTRACT, COULD BE INFERRED OR IMPLIED AT LAW) FOR WHICH CONTRACTOR



FAILED TO PROVIDE PROPER AND TIMELY NOTICE OR FAILED TO PROVIDE A TIMELY CHANGE ORDER REQUEST, AND AGREES THAT CONTRACTOR SHALL NOT BE ENTITLED TO ANY COMPENSATION OR DAMAGES WHATSOEVER IN CONNECTION WITH THE WORK EXCEPT TO THE EXTENT THAT THE CONTRACT EXPRESSLY SPECIFIES THAT CONTRACTOR IS ENTITLED TO A CHANGE ORDER OR OTHER COMPENSATION OR DAMAGES.

14.9 Change Order Processing and Pricing

14.9.1 Owner Processing of Change Order Proposals

In considering a Change Order Proposal, Owner shall check estimates in detail, utilizing unit prices where specified or agreed upon, with a view to arriving at an equitable adjustment. After receipt of a Change Order Proposal, Owner shall act thereon. If the necessity to proceed with a change does not allow time to properly check a Change Order Proposal, the change cannot be reasonably estimated, or in the event of a failure to reach an agreement on a Change Order Proposal, Owner may order Contractor to proceed based on a price to be determined at the earliest practicable date. If appropriate, Contractor may be required to proceed in accordance with Article 14.12. If a mutually acceptable agreement cannot be reached, Owner may unilaterally and in its sole discretion, direct Contractor to proceed using a Time and Materials Change Order.

14.9.2 Overhead and Profit

Profit and overhead will be paid at 10 percent of the direct allocable, allowable and reasonable costs plus, if the Work is subcontracted, 5 percent of the direct costs, regardless of the number of lower-tier Subcontractors involved in any and all changed Work, for a total maximum mark-up of 15 percent. This amount shall fully compensate Contractor (and any Subcontractors) for administration, general superintendence, overhead, profit and all other expenses not otherwise directly recoverable with respect to a Change Order.

The foregoing 10 percent mark-up is allocated to the entity (Contractor or any Subcontractor) that actually performs the Work; in the case of Work that is subcontracted, the foregoing 5 percent mark-up is allocated to Contractor, regardless of the number of lower-tier Subcontractors involved.

14.10 Failure to Agree on Change Order

Failure of Contractor and Owner to agree to any Change Order hereunder shall be a dispute to be resolved under Article 29. Contractor's claim and any award by the resolver of the dispute shall be limited to the incremental costs incurred by Contractor with respect to the disputed matter (crediting Owner for any corresponding reduction in Contractor's other costs) and shall in no event exceed the amounts allowed hereunder with respect thereto. Nothing in Article 29 shall excuse Contractor from proceeding with the Contract as changed by a Directive Letter or Time and Materials Change Order.

14.11 Release of Claims

All Change Orders executed under this Contract shall contain the following "Release of Claims" language:



Except as modified by this Change Order, all terms and conditions of the Contract, as previously modified, remain unchanged and in full force and effect. The Parties agree that this Change Order is a final and equitable adjustment of the Contract Time and Contract Amount and constitutes a mutual accord and satisfaction of all claims, current or future, of whatever nature caused by or arising out of the facts and circumstances surrounding this Change Order including, but not limited to, direct, indirect and consequential costs; additional time for performance; and the impact of the modifications specified in this Change Order, alone or taken with other changes, on the unchanged Work.

14.12 Change Order Accounting

As part of Owner's general right to issue a Directive Letters as set forth in Article 14.2, in the event the Parties cannot agree on a Change Order in a timely manner, Owner may issue a Directive Letter and require Change Order accounting. Contractor, for each change or series of related changes, shall maintain separate accounts, by job order or other suitable accounting procedure, of all incurred segregable direct costs (less allocable credits) of work, both changed and not changed, which are allocable to the change. Contractor shall maintain such accounts until the Parties agree to a Change Order for the changes ordered by Owner or the matter is conclusively disposed of in accordance with Article 29. If Owner issues a Time and Materials Change Order, Change Order accounting shall include maintenance of Time and Materials Records as described in Article 14.13.2.

14.13 Time and Materials Change Orders

Owner may unilaterally, and in its sole discretion, issue a Change Order that is based on time and material costs, as described in this Article 14.13 (a "Time and Materials Change Order") whenever Owner determines such a Change Order is advisable. In the event that payment for Work performed pursuant to an Owner-Directed Change is the basis of a dispute as provided in Article 14.10, such payment may be made pursuant to a Time and Materials Change Order pending formal resolution of the dispute under the "Claims" clause (Article 29). The Time and Materials Change Order shall instruct Contractor to perform the Work, indicating expressly the intention to treat the items as changes in the Work, and setting forth the kind, character, and limits of the Work as far as they can be ascertained, the terms under which changes to the Contract Amount will be determined and the estimated total change in the Contract Amount anticipated thereunder. Upon final determination of the allowable costs, Owner shall issue a modified Change Order setting forth the final adjustment to the Contract Amount.

The following costs and mark-ups (and no others) shall be used for calculating the change in the Contract Amount. No direct compensation will be allowed for other miscellaneous costs for which no specific allowance is provided in this Article 14.13.

14.13.1 Determination of Costs

Compensation for Time and Materials Change Orders shall be in accordance with this Article 14.13 and other limitations and processes set forth in Article 14, provided that Article 14.9.2 shall not apply. The mark-ups specified in this Article 14.13 include compensation for all delay costs, overhead costs and profit associated with the Time and Materials Change Order.

14.13.1.1. Non-Construction Labor Costs



The cost of labor for non-construction-related Work (including designers), whether provided by Contractor or a Subcontractor, will equal the sum of the following, and shall constitute full compensation for the cost of non-construction labor costs:

- Actual unburdened wages (i.e., the base wage paid to the employee exclusive of any fringe benefits); plus
- Unless already included in the wage rates paid, Owner approved labor-related costs incurred by reason of subsistence and travel allowances; plus
- A labor surcharge of 140 percent of actual unburdened wages, which shall constitute full compensation for all state and federal payroll, unemployment and other taxes, insurance and bond premiums, fringe benefits (including health insurance, retirement plans, vacation, sick leave and bonuses) and all other payments made to, or on behalf of, the worker, as well as overhead and profit.

14.13.1.2. Construction Labor Costs

The cost of labor for direct performance of construction Work will equal the sum of the following, plus a 35 percent mark-up, which shall constitute full compensation for construction labor costs:

- Contractor payment to the worker for:
- Basic hourly wage;
- Health and welfare;
- Pension;
- Vacation;
- Training; and
- Other applicable state and federal recognized fringe benefit payments.
- The labor surcharge percentage listed for the following items in the current California Department of Transportation publication that lists labor surcharge rates:
 - Workers' compensation insurance;
 - Social security;
 - Medicare;
 - Federal unemployment insurance;
 - State of California unemployment insurance;
 - State of California training taxes;



- Subsistence and travel allowances paid to the workers; and
- Contractor payment to supervisors, if authorized.

The 35 percent mark-up consists of payment for all overhead costs related to labor but not designated as costs of labor used in the direct performance of the Work, including:

- Home office overhead;
- Field office overhead;
- Bond costs;
- Profit;
- Labor liability insurance; and
- Other fixed or administrative costs that are not costs of labor used in the direct performance the Work.

14.13.1.3. Materials

The cost of materials is based on the material purchase price, including delivery charges, except:

- A 15 percent mark-up is added;
- Supplier discounts are subtracted whether Contractor/Subcontractor used them or not;
- If Owner determines, in its reasonable discretion, that (1) the material purchase prices are excessive and/or (2) Contractor or any Subcontractor, as applicable, has not furnished satisfactory evidence of the cost of materials from the actual supplier thereof within 60 days after the date of delivery of the material, then the cost of such materials shall be deemed to be the lowest wholesale price at which such materials were available in local or similar markets, in the quantities needed and delivered during the time Contractor performed the Work; and
- If Contractor or Subcontractor, as applicable, procured the materials from a source it wholly or partially owns, the cost shall be based on the lower of the:
 - Price paid by the purchaser for similar materials from that source on contract items; and
 - The lowest wholesale price at which such materials were available in local or similar markets, in the quantities needed and delivered during the time Contractor performed the Work.

14.13.1.4. Permit Fees

Contractor will be reimbursed for the cost of any additional permit fees payable as the result of the change in the Work. Back-up documentation



supporting each cost item for this category shall be provided by Contractor and approved by Owner prior to any payment authorization being granted.

14.13.1.5. Credit Items

Where Contractor's or any Subcontractor's portion of a change involves credit items, or the proposed change is a net deductive change, Contractor shall include all of Contractor's and Subcontractor's overhead and profits in computing the value of the credit.

14.13.1.6. Work by Subcontractors

If a Subcontractor performs work under a Time and Materials Change Order, there shall be an additional 5 percent mark-up to the total cost of the work performed by the Subcontractor, including the mark-ups specified in this Article 14.13.1, regardless of the number of lower-tier Subcontractors involved, as reimbursement for additional administrative costs.

14.13.2 Time and Materials Records

14.13.2.1. Collection and Maintenance of Data

Contractor shall maintain its records in such a manner as to provide a clear distinction between the following:

- The direct cost of Work for which it is entitled (or for which it believes it is entitled) to an increase in the Contract Amount; and
- The costs of other operations.

Contractor shall contemporaneously collect, record in writing, segregate and preserve the following:

- All data necessary to determine the costs described in this Article 14.13 with respect to all Work which is the subject of a Time and Materials Change Order, specifically including costs associated with design Work, but specifically excluding all negotiated Change Orders; and
- All data necessary to show the actual impact (if any) of the change on the Critical Path with respect to all Work which is the subject of a Time and Materials Change Order, if the impact on the Owner approved Baseline Program is in dispute.

Such data shall be provided to Owner on forms approved by Owner. The cost of furnishing such reports is included in Contractor's predetermined overhead and profit mark-ups.

14.13.2.2. Daily Reports

Contractor shall furnish daily reports, on forms approved by Owner, of Time and Materials Change Order Work. The cost of furnishing such reports shall be included in Contractor's overhead and fee percentages. The reports shall include:



- Name, classification, date, daily hours, total hours, rate, and extension for each worker (including both construction and non-construction personnel) and foreman;
- Designation, dates, daily hours, total hours, rental rate, and extension for each unit of machinery;
- Quantities of materials, prices and extensions;
- Transportation costs of materials and machinery;
- Invoices for materials used and for transportation charges; and
- Location and summary of work completed.

The reports shall also state the total costs to date for the Time and Materials Change Order Work.

14.13.2.3. Reports as Basis for Payment

All Time and Materials Change Order reports shall be signed by Contractor's Project Manager. Owner will compare its records with Contractor's reports, make the necessary adjustments and compile the costs of Time and Materials Change Order Work. When such reports are agreed upon and signed by both Parties, they will become the basis of payment, but shall not preclude subsequent adjustment based on a later audit. Contractor's (and each Subcontractor's) cost records pertaining to Work paid for on a time and materials basis shall be open, during all regular business hours, to inspection or audit by representatives of Owner during the life of the Contract and for a period of not less than seven years after termination of the Contract, and Contractor (and each Subcontractor) shall retain such records for that period. If an audit is to be commenced more than 60 days after termination of the Contract, Contractor will be given a 20-day notice of the time when such audit is to begin.

14.14 Change in Applicable Laws

Contractor shall be entitled to an extension of the Contract Time or to an increase to the Contract Amount, as applicable, if a change in any Applicable Law is both (a) a Discriminatory Change and (b) affects the physical Trainset Work, provided that Contractor shall not be entitled to such relief based on (i) a change to an Applicable Law that was enacted 30 days prior to the "Financial Proposals Due (Hard and Electronic) Close Date" set forth in Section 5 of the Instructions to Offerors (or 30 days prior to submission of a revised proposal or best and final offer, if any) or (ii) Rules of Particular Applicability issued by the FRA. For the avoidance of doubt, Contractor shall not be entitled to a Contract Modification based on changes related to taxes. Contractor shall be deemed to have had notice of all Applicable Laws enacted at the time of Contract execution, regardless if the effective date of the Applicable Law is after Contract execution.

In the event any Applicable Laws are removed, relaxed or changed in any way after the execution of the Contract so as to make Contractor's performance less expensive or less difficult, Owner shall have the option to either require Contractor to perform pursuant to the more rigorous requirements, or to receive a reduction in the cost of the items of material or equipment affected for all savings by reason of such change.



14.15 Force Majeure Events

14.15.1 In the event either Party's failure to perform in accordance with its obligations under the Contract arises solely out of a Force Majeure Event that is both out of the control of such Party and without the fault or negligence of such Party, the time for performance under the Contract may be extended as provided in this Article 14.15. Contractor shall not be entitled to any increase in the Contract Amount related to any damages occasioned by way of the causes specified in this Article.

14.15.2 No failure to perform described in Article 14.15.1 shall be considered a breach or default under the Contract if the affected Party within ten days after the date it became aware of the delay or the date by which it should reasonably have become aware of the delay, whichever is earlier, notify the other Party, in writing, of the causes of the delay and diligently takes effective measures by all available means to re-start performance fully in accordance with the Contract.

14.16 Delays

Contractor acknowledges that Work to be accomplished under the Contract may be required to be performed on Owner's property simultaneously with ongoing daily railroad operations. Such operations include, but are not limited to, the passage of trains, and the repair, construction, reconstruction, and maintenance of the railroad right-of-way and facilities. Contractor is advised that these conditions may cause delays and suspension of the Baseline Program. Contractor acknowledges that to the extent such delays and suspensions are reasonably foreseeable as of the date hereof and such delays and suspensions have been taken into account by Contractor and are included in all performance schedules and the Contract Amount and shall give rise to no claims by Contractor even if they have an impact on the Critical Path. However, if a delay in the Critical Path of the Baseline Program occurs as a result of railroad operations that were not reasonably foreseeable or of which Contractor knew or had reason to know as of the date of the Contract, then Contractor shall be allowed an extension of the Contract Time equal to the actual delay to the critical path necessarily caused in the completion of the Work and to an adjustment of the Contract Amount for any increase in the cost of performance of the Work (excluding profit) necessarily caused by such delay. However, no adjustment of the Contract Time or Contract Amount shall be made for any delay: (a) to the extent that performance would have been suspended, delayed or interrupted by any other cause, including the fault or negligence of Contractor or (b) for which equitable adjustment is provided for or excluded under any other provision of the Contract.

14.17 Suspension of the Work

If Owner exercises its suspension rights under Article 22, Owner shall grant to Contractor an extension of the Contract Time for the relevant part of the Work equal to the length of the actual delay to the Critical Path necessarily caused by such suspension, but there shall be no adjustment of the Contract Amount in connection with such suspension except as explicitly provided in this Article. In the event that the Work is suspended by Owner pursuant to this Article for more than thirty days, the Contract Amount for such part of the Work may be adjusted for any increase in the cost of performance of the Work (excluding profit) necessarily caused by such suspension. However, no adjustment of the Contract Time or Contract Amount shall be made for any suspension: (a) to the extent that performance would have been suspended, delayed or interrupted by any other cause, including the fault or



negligence of Contractor or (b) for which equitable adjustment is provided for or excluded under any other provision of the Contract.

14.18 Material Changes to Draft Tier III Regulations

Notwithstanding Article 14.14, with respect to the manufacturing of Fleets 1 and 2 (through Fleet Acceptance for those Fleets) and no other Work, Contractor shall be entitled to an extension of the Contract Time or to an increase to the Contract Amount, as applicable, if the permanent Tier III regulations published in the Federal Register by the FRA are materially different from the draft version of those regulations attached as Schedule 10 to the General Provisions, provided that such difference(s) must affect the physical Trainset Work.

14.19 Federal Acquisition Regulation

When adjusting the Contract Amount pursuant to this Article 14, such adjustment shall, at a minimum, be allowable, allocable and reasonable in accordance with the contract cost principles and procedures of Part 31 of the Federal Acquisition Regulation (FAR), as amended by O.M.B. Circular A-87.

15. TERMINATION FOR DEFAULT

- 15.1** Owner may, by written notice to Contractor, terminate for default the Contract in whole or in part upon occurrence of any one or more of the following, including but not limited to: (1) Contractor fails to deliver Trainsets within the time specified herein; (2) Contractor fails to make progress, so as to endanger timely performance under the Contract; (3) Contractor fails to meet any Baseline Program milestone; (4) the Trainsets fail to conform with all requirements of the Contract; (5) Contractor fails, without cause, to make prompt payment to Subcontractors or to make prompt payment for equipment, materials and/or labor; (6) Contractor noncompliance with Applicable Laws or the proper instruction of Owner; (7) Contractor fails to make any payments due to Owner under the Contract; (8) Contractor fails to submit the required irrevocable letter(s) of credit, any Guaranties and the insurance as required hereunder to Owner and to keep such letter(s) of credit, any Guaranties and the insurance as required hereunder in full force and effect as required under the Contract; (9) transfer of any interest in the Contract without the approval of Owner; (10) Contractor fails to comply with a suspension of Work notice by Owner; (11) Contractor or any Guarantor becomes insolvent, generally does not pay its debts as they become due, admits in writing its inability to pay its debt, or makes an assignment for the benefit of creditors; (12) insolvency, receivership, reorganization, or bankruptcy proceedings have been commenced by or against Contractor or any Guarantor and not dismissed within 60 days; (13) any material representation or warranty made by Contractor or any Guarantor in the Contract or in any certificate, schedule, instrument or other document delivered pursuant to the Contract is false or materially misleading when made; (14) any Guarantor revokes or attempts to revoke its obligations under its Guaranty, or otherwise takes the position that such instrument is no longer in full force and effect; (15) Contractor fails to comply with Owner's rules or breach of or failure to comply with any other provision of the Contract. Owner, at its option and in its sole discretion, may excuse any such default (a) for the reasons set forth below or (b) if the default is cured within 10 days after Contractor's receipt of a written notice of default from Owner. Owner shall not be required to provide written notice of default if Contractor fails to deliver the Trainsets within the time specified herein. In the event that Contractor's default is not excused or cured to the satisfaction of Owner, Owner may terminate the Contract in whole or in part and reprocure the Trainsets from another source, in which event Contractor



shall be liable for (1) repayment to Owner of any payments made by Owner and (2) any “excess costs” to Owner relating to the reprocurement. “Excess cost” are the difference between the Contract Amount for the terminated supplies and/or Work and the total costs incurred by Owner to procure replacement supplies and/or Work. In the event that the Contract is terminated only in part, the remaining part shall remain in full force and effect.

- 15.2** If Owner terminates the Contract, in whole or in part, whether for convenience or for default, Contractor shall not be entitled to receive any further payment for the terminated Work. Further, Owner may take possession of all of the materials, equipment and tools on the site(s) and may continue the Work by whatever method he may deem expedient, including the acquisition, under the terms and in the manner Owner considers appropriate, supplies or services similar to those terminated. Provided that the termination was for default, Contractor shall be liable to Owner for any excess costs for those supplies or services.
- 15.3** Upon termination of the Contract, in whole or in part, whether for default or convenience, Contractor shall, if directed by Owner, take action including but not limited to:
- (a) Stop the terminated Work on the date and to the extent specified in the notice of termination, without creating a hazardous condition;
 - (b) Place no further Subcontracts for materials, equipment, services, facilities or other items, except as may be necessary for completion of such portion of the Work as is not terminated;
 - (c) Unless directed otherwise by Owner, terminate all Subcontracts to the extent that they relate to the performance of terminated Work;
 - (d) Furnish Owner with a release of all claims against Owner, including all claims by Subcontractors, and including a release of all claims related to Work completed in accordance with the Contract, to the extent Owner has made payment in respect thereof in accordance with Article 10.
 - (e) Take such other reasonable action as Contractor may deem necessary, or as Owner may direct, for the protection of property which is in the possession of Contractor and in which Owner has or may acquire an interest;
 - (f) Cooperate fully with Owner to enable Owner to effectively and efficiently continue and complete the Work;
 - (g) Assign to Owner, in the manner, at the time, and to the extent directed by Owner, all of the right, title and interest of Contractor under the Subcontracts;
 - (h) To the extent reasonably required by Owner, settle all outstanding liabilities and all claims arising out of the termination without cause of Subcontracts, with the approval of Owner;
 - (i) Transfer title to Owner and deliver in the manner, at the time, and to the extent, if any, directed by Owner (1) the fabricated or un-fabricated parts, Work in progress, dies, jigs, fixtures, plans, drawings, information, contract rights, completed Work, supplies, and other material and other property produced as a part of, or acquired in connection with the performance of, the terminated Work, including without limitation all books, files and records relating to the Project,



and (2) the completed or partially completed plans, drawings, fabrication drawings, information, and any other property which, if the Contract had been completed, would have been required to be furnished to Owner;

- (j) To the extent requested by Owner, use its best efforts to sell, in the manner, at the times, to the extent, and at the price or prices directed or authorized by Owner, any property of the types referred to in Article 15.3(i) above, provided, however, that Contractor (1) shall not extend credit to any purchaser, and (2) may acquire any such property under the conditions prescribed and at a price or prices approved by Owner; and provided, further, that the proceeds of any such transfer or disposition shall be applied in reduction of any payments to be made by Owner to Contractor under the Contract or shall otherwise be credited to the price or cost of the Work covered by the Contract or paid in such other manner as Owner may direct;
- (k) Complete, in accordance with the Contract, performance of such part of the Work as shall not have been terminated by the notice of termination; and
- (l) Execute any further documents reasonably required by Owner to confirm or effectuate the terms of this Article without compromising Contractor's right or remedies.

15.4 In the event Owner terminates the Contract for default pursuant hereto, Contractor shall bear all costs and expenses incurred in connection with this Article. This Article shall survive the termination of the Contract.

15.5 If, after termination, it is determined that Contractor was not in default, or that the default was excusable, the rights and obligations of the Parties shall be the same as if the termination had been issued for Owner's convenience under Article 16.

15.6 The rights and remedies of Owner in this Article are in addition to any other rights and remedies provided by law or in equity or otherwise provided under the Contract.

16. TERMINATION FOR CONVENIENCE

16.1 Owner shall have the right, in its sole discretion and upon 15 days written notice to Contractor, to terminate the Contract in whole or in part for its convenience.

16.2 In the event of a termination for convenience, Contractor shall submit his "Termination Expenses" claim consistent with Article 16.3 to Owner, in the form prescribed by Owner. Such claim shall be submitted promptly but in no event after Final Payment.

16.3 Upon Contractor's compliance with Article 15.3, Owner shall pay Contractor the Termination Expenses which shall be, if appropriate and reasonable, an amount equal to the total of (without duplication):

- (a) All amounts due, and not previously paid to Contractor, for Work authorized and completed in accordance with the Contract prior to the date of termination; provided that:
 - (i) for Work Contractor has performed towards a Milestone that it did not achieve prior to the date of termination, Owner shall pay Contractor the full amount of the Milestone Payment, reduced by pro-rata to reflect the extent to which the Work to be compensated by that progress payment



remains unperformed or was performed other than in accordance with the Contract;

- (ii) during the Overall Trainset Service Period, for the Trainset Incremental Service Payment due for the month of termination, Owner shall pay Contractor pursuant to Article 10.4.3 for the month at issue, reduced by pro-ration to reflect the portion of the month terminated;
 - (iii) during the Overall Trainset Service Period, for the Mileage Incremental Service Payment due for the month of termination, Owner shall pay Contractor pursuant to Article 10.4.4 for the actual miles travelled by Trainsets in the Trainset Service Period during the month at issue up until the date of termination; plus
- (b) Contractor's cost of settling and paying termination settlement proposals under terminated Subcontracts that are properly chargeable to the terminated portion of the Contract; plus
 - (c) Contractor's expenses incurred for demobilization; plus
 - (d) 10% of items (b) and (c) above for overhead and profit; plus
 - (e) Contractor's reasonable expenses incurred in fulfilling its obligations hereunder in respect of termination; less
 - (f) with respect to any Fleet for which Owner has issued an NTP but Contractor has not reached Fleet Acceptance for that Fleet, the positive difference between (i) Milestone Payments paid by Owner to Contractor for that Fleet as of the date of termination and (ii) Contractor's actual costs, plus a 15% mark-up, incurred in connection with achieving the Milestones for which such Milestone Payments were made; less
 - (g) with respect to any Manufacturing Restart Payment paid by Owner for a Fleet, if the date of termination is within 180 days of NTP for the Fleet at issue, the positive difference between (i) the Manufacturing Restart Payment paid and (ii) Contractor's actual costs to restart manufacturing for the Fleet at issue.

The Termination Expenses shall not exceed the total Contract Amount for the Fleets ordered, as reduced by (i) the amount of payments otherwise made by Owner to Contractor prior to the date of termination and (ii) in the case of a partial termination, the portion of the Contract Amount attributable to the Work not terminated. The Contract shall be amended accordingly, and Owner shall pay Contractor the amount determined in accordance with this Article 16.3. Payment of the Termination Expenses shall constitute an accord and satisfaction of Contractor's rights in the event of a termination for convenience. Except for the right to be paid the Termination Expenses, Contractor shall have no right or claim to any monies or damages with respect to a termination for convenience and shall make no other claim in the event of such a termination.

- 16.4** Notwithstanding Articles 16.2 and 16.3, if Contractor's failure to perform in accordance with its obligations under the Contract extends for more than 30 days from the start of the Force Majeure Event, Owner may, at its discretion, terminate the Contract without liability at any time after such 30 days. In the event of such early termination, if requested by Owner, Contractor shall transfer title and deliver to Owner in the manner directed by Owner, any completed or partially completed



deliverables or other work products Contractor has produced or acquired specifically for performance of the Work under the Contract.

- 16.5** Notwithstanding Articles 16.2 and 16.3, Owner may terminate the Contract under this Article 16 prior to its issuance of an NTP without incurring any cost or liability to Contractor, including any responsibility to pay Termination Expenses.

17. CONTRACTOR KEY PERSONNEL

- 17.1** Contractor shall designate, prior to the commencement of the Work, "Key Personnel" who shall include: an individual to whom all Owner communications concerning the Contract may be addressed (the "Contractor Representative" or other title); and "Project Manager" (or other title), who shall report to the Contractor Representative, and shall be in charge of the Work.
- 17.2** Owner shall have the right to approve and disapprove the assignment and replacement by Contractor of all Key Personnel. Before assigning an individual to any of the positions designated herein, whether as an initial assignment or a subsequent assignment, Contractor shall notify Owner of the proposed assignment, shall introduce the individual to appropriate Owner representatives, and shall provide Owner with a resume of any other information about the individual reasonably requested by Owner. If, after being notified thereof, Owner in good faith objects to the proposed assignment within 15 days, then Contractor agrees to discuss such objections with Owner and attempt to resolve such concerns on a mutually agreeable basis. If the Parties have not been able to resolve Owner's concerns within five days, Contractor shall not assign the individual to that position and shall propose to Owner the assignment of another individual of suitable ability, experience and qualifications.
- 17.3** Contractor shall employ and utilize all Key Personnel for the positions for which they were approved under this Article 17. Contractor shall not change or otherwise replace any such individuals except due to retirement, death, disability, incapacity or voluntary or involuntary termination of employment.
- 17.4** Owner shall have the right, without any recourse by Contractor, to direct Contractor to replace employees who Owner judges to be incompetent, careless, unsuitable or otherwise objectionable, or whose continued use is deemed contrary to the best interests of Owner. Before Owner issues a directive to replace an employee, Owner and the Contractor Representative shall discuss Owner's concerns about the employee. Upon receipt of a directive from Owner to replace an employee, Contractor shall immediately proceed with the replacement unless it can demonstrate that Owner's directive is unreasonable. Owner's directive shall include the desired replacement date and the reason the employee needs to be replaced. Contractor shall effect the replacement in a manner that does not degrade quality of the Work. In addition, the employee replaced by Contractor shall not return to the Project in any capacity without prior written consent from Owner.
- 17.5** Contractor shall notify Owner in writing of any proposed replacement of Key Personnel. Owner retains the right to approve or disapprove any requested replacement prior to Contractor making the requested replacement. Any such approval shall not be valid unless it is written. Said approval shall not be unreasonably withheld, provided that Owner reserves the right to disapprove a request if the Owner determines, in its reasonable discretion, that the replacement is not at least as qualified as the individual being replaced.



18. OFFICE SPACE REQUIREMENTS

Contractor shall provide all office and other building space and facilities required to perform the Work, including, but not limited to providing:

- (a) Office space at Contractor's design office(s);
- (b) Office space at Contractor's main manufacturing/assembly plants; and
- (c) Office space at the Trainset testing and commissioning sites.

Contractor shall provide the office space described in (a) through (c) above until at least 30 days after Final Acceptance of the last Trainset of the last Fleet ordered by Owner under the Contract. In addition, the office space described in (a) through (c) above shall each accommodate five of Owner's staff or consultants, and such space shall include all facilities, including office furniture, adequate printing facilities and supplies, internet connections and supply of domestic water, electricity, telephone, gas (natural gas or liquefied petroleum gas (LPG)), air conditioning, janitorial services, sewerage and adequate parking, at no additional cost to Owner.

19. CONTRACTOR-PROVIDED MANAGEMENT PLANS

Contractor shall develop a comprehensive Project Management Plan ("PMP") that details how Contractor will plan, execute and control the Work. The PMP shall be expressly developed for this Contract and shall be developed in accordance with the Quality Management System Requirements of ISO 9001-2008.

The first tier of the PMP shall fully describe Contractor's approach to the management of the Contract and shall be submitted to Owner for approval. The first tier of the PMP shall layout a program for the development of the second and lower tiers of the PMP such that these tiers are in place, trained and effective to manage the follow-on work, with the dates related to this development being included in the Baseline Program. The second and lower tiers of the PMP shall be submitted to Owner for review. Contractor shall review the PMP on a regular basis (at a minimum, quarterly) and shall update the PMP as required by Owner. The updates shall be submitted to Owner for review.

As part of the PMP, Contractor shall address its development of all programs and plans required for Contractor to perform the Work. The PMP shall address, but not be limited to, the following programs and plans:

- (a) Submittal and Design Review Program – A program that identifies the methods and procedures for making design submittals and for design reviews. As part of the program, Contractor shall propose times at which design reviews are to be held. The actual timing shall be agreed with Owner.
- (b) Testing and Commissioning Program – A program addressing the development of a testing regime in accordance with Contract requirements, including, but not limited to, Schedule 2, so as to ensure fully functioning Trainsets.
- (c) Configuration Management Plan – A plan that identifies the methods and procedures that shall be used to achieve the requirements of the Configuration Management system. The plan shall identify how the interfaces between design, production and management teams are controlled, and the associated procedures, systems and techniques employed.



- (d) Maintenance Plan - A tiered plan, that includes detailed maintenance procedures and describes how the Work is to be maintained throughout its life to achieve the specified performance. The plan shall include detail regarding Special Tools required to complete the Work.
- (e) Maintenance Training Plan – A tiered plan to train Owner’s maintenance team to effectively carry out the Maintenance Plan, which shall include detail regarding the provision of Contractor-supplied maintenance training simulators.
- (f) Operation Plan – A tiered plan that describes how the equipment, systems and subsystems provided under the Contract are designed to operate under various scenarios, including normal, abnormal and failure conditions. The plan shall describe actions required to be taken by the drivers and on-board staff.
- (g) Operator Procedures – A tiered subset of the Operation Plan, which provides detailed operating procedures that the drivers and on-board staff are to follow in the operation of the equipment, systems and subsystems under normal, abnormal and failure conditions.
- (h) Operator Training Plan – A tiered training program that provides all training instructions and materials necessary for the training required for Owner staff to operate the equipment, systems and subsystems provided under the Contract. The Training Plan shall include means to certify that staff, upon completion of training, have the necessary competence to operate the equipment, systems and subsystems.
- (i) Quality Plan - A tiered plan that is fully compliant with the principles of the latest version of ISO 9001.
- (j) Safety Plan – A tiered plan that includes, but is not limited to, the requirements of Section 6.4 of the Performance Specifications.
- (k) Service Plan – A tiered plan that fully describes how Contractor will meet its obligations during the Trainset Service Period.

20. CONFIDENTIALITY

- 20.1** Contractor agrees that all information furnished or disclosed by Contractor, its employees, agents or representatives to Owner in connection with the Contract (1) is furnished or disclosed as part of consideration of the Contract; (2) subject to federal law, shall not be treated as confidential or proprietary information of Contractor, its employees, agents or representatives unless otherwise agreed in writing by Owner; and (3) subject to third party copyright restrictions, may be used, copied or disclosed by Owner for any purpose. Contractor expressly waives all claims against Owner and releases Owner relating to the use, copying or disclosure of such information by Owner, its assigns, or intended beneficiaries.
- 20.2** No employee, agent, or representative of Owner, other than Owner, is authorized to accept any information which Contractor considers to be proprietary or confidential. Only Owner has authority to enter into an agreement, which shall be in writing, to provide for the confidential treatment of, or limit disclosure of, information furnished or disclosed to Owner by Contractor, its employees, agents or representatives.
- 20.3** Contractor agrees that it, its employees, Subcontractors, agents and/or representatives shall not disclose, without the prior written consent of Owner, any



information relating to the Contract to any third party. In addition, they shall not make any news or press releases, articles, brochures, advertisements, speeches or other information releases relating to the Contract without the prior approval of Owner.

- 20.4** Contractor agrees that it, its employees, Subcontractors, agents and/or representatives will keep confidential any financial information, employee information, customer or marketing information, business plans, designs, drawings, specifications, engineering data, technical information, policies, procedures, processes, analyses or proprietary information which either (1) is furnished by Owner; or (2) is, or will become as a result of the work furnished under the Contract, the property of Owner. Contractor further agrees not to disclose such items or any information contained therein to third-parties and to use such items and information solely for the benefit of Owner in the performance of the Contract or other written orders from Owner. Upon completion or termination of the Contract, or as otherwise requested by Owner, Contractor shall immediately return all such items and information to Owner or make other disposition thereof as directed by Owner.
- 20.5** Contractor shall fully indemnify the Indemnified Parties against any and all actions, claims, liability, costs, damages, charges and expenses suffered or incurred in connection with or arising out of any breach by Contractor of any of the provisions of this Article 20. Contractor acknowledges that a breach of its obligations hereunder cannot be compensated adequately by an award of damages or other pecuniary remedy, and that Owner shall also be entitled in the event of any such breach to the remedies of injunction, specific performance or other equitable relief.
- 20.6** Contractor agrees that, in the event any confidential information of Owner is sought by subpoena or other process, Contractor will promptly give notice of such subpoena or process to Owner, pursuant to the notification provisions herein, before responding to such subpoena or process.
- 20.7** The confidentiality provisions in this Article 20 shall survive the termination or expiration of the Contract.

21. MONTHLY PROGRESS REPORTS

- 21.1** Timely and systematic reporting is vital to efficient and effective project management. Contractor shall submit to Owner written monthly progress reports which are the primary mechanism for providing detailed information about the progress of the project. These reports compile and combine all the information from the project functional areas and disciplines. Each report shall cover all significant activities occurring during the previous month and is due seven days after the end of each month.

The monthly progress reports shall indicate month and calendar year and, as a minimum, include the following:

- (a) Executive Summary & Narrative
- (b) Baseline Program / First Article Inspection Schedule
- (c) Schedule Status Update (notification of any risk of potential slippage)
- (d) Engineering/Design Progress
- (e) Project Look Ahead (activities for the next three months)



- (f) Change Order Log
- (g) Financial Summary
- (h) Areas of Concerns/Problems
- (i) CDRL Status Update
- (j) Drawing Approval Status List
- (k) Project Team and/or Organization or Responsibility Changes (as they occur)

22. SUSPENSION OF THE WORK

22.1 Suspensions Generally

Contractor shall not suspend the Work without permission of Owner. When under suspension, Contractor shall continue to be responsible for the Work, prevent damage or injury to the Work, obtain and maintain compliance with all Governmental Approvals and maintain all Contractor-provided insurance and bonds. If the suspension is for Owner's convenience under Article 22.4, the work performed by Contractor during the suspension period, as described in this Article 22.1, shall be considered an Owner-Directed Change. No increase in the Contract Time or the Contract Amount will be made for suspensions required for Contractor to comply with any Governmental Approval.

22.2 Owner Suspension of the Work

Owner shall have the right at any stage of the Work, by written notice, to suspend all or any part of the Work for such period of time as determined appropriate by Owner. Contractor shall promptly comply with any such written notice. Contractor shall promptly recommence the Work upon receipt of written notice from Owner directing Contractor to resume some or all of the Work and shall not resume any Work until receipt of such notice.

22.3 Suspension for Cause

Owner has the authority by written notice to suspend the Work without liability to Owner wholly or in part for Contractor's failure to:

- (a) correct conditions unsafe for project personnel or the general public;
- (b) comply with any Governmental Approval or Applicable Law;
- (c) carry out order of Owner duly given; or
- (d) comply in all respects with the requirements of the Contract.

Contractor shall not be entitled to any extension of the Contract Time or increase in the Contract Amount in connection with any suspension of the Work or portion thereof pursuant to this Article 22.3.

22.4 Suspension for Convenience

Any Owner suspension of the Work under this Article 22 that is not a suspension for cause under Article 22.3 is considered a suspension for convenience. If Owner



suspends the Work for convenience in whole (as opposed to a suspension of part of the Work) for more than 180 consecutive days, Contractor may terminate the Contract without liability to Owner, provided that such right may be exercised (1) only upon Contractor providing 60 days written notice to Owner, provided Contractor gives such notice on or after the 120th day of the suspension, and expressing Contractor's intention to so terminate the Contract, and (2) only if within the 60 day notice period, Owner does not end such suspension. Such termination shall be deemed to be a termination for convenience under Article 16.

23. OWNER'S RIGHT TO CARRY OUT THE WORK

If Contractor fails to carry out the Work in accordance with the Contract and fails, within a ten day period after receipt of written notice from Owner to cure this default with diligence and promptness, Owner may give Contractor a second written notice to correct such deficiencies within a second ten day period. If Contractor within such second ten day period after receipt of such second notice fails to commence and continue to correct any deficiencies, Owner may, without prejudice to other remedies Owner may have, correct, or cause to be corrected, such deficiencies. In so doing, Owner or its designee shall utilize any of Contractor's materials, plant and equipment necessary to correct the deficient Work. In such case, an appropriate Change Order shall be issued deducting from payments then or thereafter due Contractor the cost of correcting such deficiencies, including compensation for Owner's additional services and expenses made necessary by such default, neglect or failure. If payments then or thereafter due Contractor are not sufficient to cover such amounts, Contractor shall pay the difference to Owner within 30 days of Contractor receiving written notice from Owner requesting payment of this difference.

24. NON-PERFORMANCE BY OWNER

Owner's failure to perform any of its responsibilities set forth in the Contract shall not be deemed to be grounds for termination, suspension or slowdown of the Work by Contractor; provided, however, that Contractor's nonperformance of its obligations to perform the Work shall be excused if and to the extent: (a) Contractor is unable to perform and its inability to perform is caused by Owner's failure to perform its responsibilities, and (b) Contractor provides Owner with reasonable notice of nonperformance and uses all reasonable efforts to perform notwithstanding Owner's failure to perform.

25. INTELLECTUAL PROPERTY RIGHTS

- 25.1** Contractor shall pay any and all royalties and license fees required to be paid to third-parties in connection with (a) Contractor's efforts relating to the Work, and (b) Owner's use and exploitation (as defined below) of any portion of the Work. In addition, Contractor shall defend and indemnify Owner from, and hold Owner harmless from and against, any and all costs, expenses, losses and liabilities (including without limitation costs, expenses and attorneys' fees) arising out of or in connection with any and all demands, suits, claims and other similar proceedings brought by third-parties alleging infringement of any patent or misappropriation of any other proprietary rights provided that Owner provides Contractor with reasonable notice of the same. As used in this Article 25, "exploitation" of the Work shall include without limitation all "Allowable Uses". With respect to the Work, Contractor shall not use or permit the use of or furnish for use by Owner or another party any appliance, article, device, or method of construction, design or manufacturing, unless Contractor has obtained all necessary consents or authorizations for such use or uses. Such consents or authorizations obtained by Contractor shall include without limitation all



rights necessary to permit Owner in accordance with the Allowable Uses to use or permit the use of or furnish for use by another party such appliance, article, device, or method of construction, design or manufacturing to the extent necessary in connection with Owner's use or exploitation of the Work.

- 25.2** Contractor hereby grants to Owner an irrevocable, fully paid-up right and license under the Intellectual Property to make and use any and all products, methods and services, and to use, copy, have copied, modify, have modified, incorporate in other products, prepare derivative works from, have derivative works prepared from, and distribute any and all copyrightable works, in each case in connection with and limited to Allowable Uses. As used herein, "Intellectual Property" shall mean all rights and interests held or otherwise controlled by Contractor worldwide in and to (a) any and all patent applications and patents; (b) any and all proprietary knowledge, data and trade secrets; (c) any and all engineering data and information; and (d) any and all drawings, designs, specifications, notes and other works, prepared, developed or acquired in performance of the Work.

In addition, Contractor shall cause each and every Subcontractor to grant to Owner an irrevocable, fully paid-up right and license under the Subcontractor Intellectual Property, to make and use any and all products, methods or services, and to use, copy, have copied, modify, have modified, incorporate in other products, prepare derivative works from, have derivative works prepared from, and distribute any and all copyrightable works, in each case in connection with and limited to Allowable Uses. As used herein, "Subcontractor Intellectual Property" shall mean all rights and interests held or otherwise controlled by a Subcontractor worldwide in and to (a) any and all patent applications and patents; (b) any and all proprietary knowledge, data and trade secrets; (c) any and all engineering data and information; and (d) any and all drawings, designs, specifications, notes and other works, prepared, developed or acquired in performance of the design services component of the Work.

"Allowable Uses" shall be limited to (a) the use, maintenance or repair (including wreck repairs) of the Trainsets or (b) work performed by or on behalf of Owner to complete the Work after the termination of the Contract for default (or, in the case of Subcontractor Intellectual Property, after termination for cause of the relevant Subcontractor) or (c) other Owner equipment acquisitions in the event Contractor or its affiliates ceases to be in the business of manufacturing and selling the Trainsets (or, in the case of Subcontractor Intellectual Property, the applicable Subcontractor ceases to be in the business of selling the equipment to which the applicable Subcontractor Intellectual Property relates). Contractor shall require Subcontractors to grant a license to use the Subcontractor Intellectual Property for "Allowable Uses" as provided under (b) and (c) to Owner, or if no such license is granted by a Subcontractor to the Owner, then the license granted by such Subcontractor to Contractor shall be broad enough to include the Allowable Uses and Contractor shall have the right to sublicense such rights to the Owner.

Owner shall have no right to sublicense the rights and licenses granted to Owner pursuant to this Article 25.2 (or rights and licenses under Subcontractor Intellectual Property) to a competitor of Contractor (or, in the case of Subcontractor Intellectual Property, a competitor of the applicable Subcontractor), except (i) in connection with the completion of the Work (provided that Owner shall have no right to so sublicense the Subcontractor Intellectual Property to complete the Work if the relevant Subcontractor has not been terminated for default), (ii) to obtain prompt repair of the Trainsets or other Work Deliverables, or (iii) in connection with Owner's acquisition of other equipment in the event Contractor ceases to be in the business of manufacturing and selling the Trainsets (or, in the case of Subcontractor Intellectual



Property, the applicable Subcontractor ceases to be in the business of selling the equipment to which the applicable Subcontractor Intellectual Property relates).

- 25.3** Without limiting any right or remedy of Owner, if Owner is enjoined from using all or any portion of the Work as to which Contractor is to indemnify Owner against infringement or misappropriation, Contractor shall, at Owner's request and at Contractor's expense, either (i) procure promptly for Owner the right to continue using the Work, or (ii) promptly replace all or any portion of the Work with a non-infringing product or part which is satisfactory to Owner and the use of which does not violate the terms and conditions of such injunction, or (iii) promptly modify all or any portion of the Work in a manner satisfactory to Owner so as to render use of such Work non-infringing and not in conflict with the injunction. The requirements set forth in Sections 30.1, and 30.2 shall apply fully to any Work replaced or modified by Contractor in accordance with clauses (ii) and (iii) of this Article 25.3.
- 25.4** To secure Owner's rights hereunder Contractor shall place copies of its then current system design, source code and object code, listings and related Documentation including, without limitation, annotated notes, detailed technical documentation and executables for Contractor's software and Subcontractor's non-commercially-available software that would be necessary to facilitate the Owner's exercise of its rights in the Intellectual Property provided in Articles 25.1 through 25.3 (the "Escrow Materials") with an independent escrow agent, subject to the terms and conditions of the independent escrow agent's standard agreement (the "Escrow Agreement") and in accordance with the provisions of this Article 25.

25.5 Release Conditions.

As used in the Contract, "Release Condition" shall mean the occurrence of any of the following events with respect to Contractor during the term of Owner's rights hereunder:

- (a) if Contractor materially breaches an express obligation with respect to the Contract, then Owner shall so notify Contractor in writing in accordance with the notice provisions set forth in the Contract ("Breach Notice"), specifying in reasonable detail the basis for Owner's claim of breach. Owner shall serve a copy of the Breach Notice simultaneously upon the escrow agent under the Escrow Agreement. At the same time that Owner delivers the Breach Notice, it may also deliver notice to the escrow agent under the Escrow Agreement, with a copy to Contractor, requesting the escrow agent to release of the Escrow Materials (a "Release Notice"). The Release Notice will commence the 30 Working Day period under the Escrow Agreement, if such 30 Working Day period is required, for Contractor to issue contrary instructions. Contractor shall (i) cure such breach during the 30 day period immediately following its receipt of the Breach Notice ("Cure Period"); or (ii) if such breach is of a nature such that it is not capable of being cured within such period, (A) provide Owner a plan for cure that will cure the breach within 60 days from the date of the Breach Notice (the "Extended Cure Period") and (B) commence acting on such plan during the initial Cure Period. If Contractor fails to meet its obligations under (i) and (ii) above or does not send written notice to Owner of a good faith dispute of the breach specified in the Breach Notice, then Contractor hereby agrees that it will not issue contrary instructions to the escrow agent under the Escrow Agreement, and the escrow agent under the Escrow Agreement will be authorized to release the Escrow Materials upon the tolling of the 30 Working Day Period during which Contractor was allowed to issue contrary instructions; provided however if the breach is of such a nature that it could not have been



cured during the initial Cure Period and Contractor complied with its obligations under (ii) above, then Contractor may issue contrary instructions only to the extent it prohibits the escrow Agent under the Escrow Agreement from releasing the Escrow Materials until the end of the Extended Cure Period.

- (b) the entry of an order for relief in a proceeding in bankruptcy (other than Chapter 11 of Title 11 of the U.S. Code, as the same may be amended) in which Contractor is the named debtor; (ii) Contractor's making of an assignment for the benefit of Contractor's creditors; (iii) the appointment of a receiver for Contractor; (iv) the filing of (1) any bankruptcy proceeding against Contractor, other than Chapter 11 of Title 11 of the U.S. Code, (2) any proceeding for an assignment for the benefit of Contractor's creditors or (3) any proceeding for appointment of a receiver or custodian of the assets and property of Contractor, which proceeding shall be consented to or acquiesced to be by Contractor or has not been discharged or terminated within 90 days; or (v) the rejection by Contractor or any trustee of Contractor of the license agreement pursuant to 11 U.S.C. Section 365. The terms of Article 25.5(a) shall apply if following the filing of a proceeding under Chapter 11 of Title 11 of the U.S. Code, Contractor or its trustee materially breaches an express obligation under the Contract.
- (c) Contractor dissolves, liquidates or ceases to provide services or work similar to those provided for under the Contract for a substantial number of its customers for a period of at least 30 days.
- (d) the Parties have entered into a good faith dispute and Contractor ceases providing services or work similar to those provided for under the Contract prior to the final conclusion of the dispute resolution process set forth in Article 29; provided that no such release condition will be deemed to have occurred if (i) Contractor has obtained a court order allowing it to cease performance of the Contract or (ii) Owner has failed to pay undisputed invoices or make Milestone Payments for the Work for 90 days following written receipt of notice of breach from Contractor.

25.5.2 Use of Escrow Materials.

Contractor hereby grants Owner an irrevocable license to use or have used on its behalf the Escrow Materials upon their release to Owner only to perform and authorize the performance of the Allowable Uses.

25.5.3 Establishment of Escrow.

The escrow shall be established and maintained by Contractor. For the first ten years of the escrow period, Contractor shall be solely responsible for the cost to maintain the escrow. After ten years, Contractor shall continue to maintain the escrow with responsibility of payment to be borne by Owner. The deposit made with the escrow agent shall be kept current so as to accurately reflect the then current version of the Escrow Materials and promptly updated by Contractor following each material Upgrade, modification or enhancement thereto. Contractor shall designate a mutually acceptable neutral third party that, at the expense and request of Owner made from time to time, may audit the materials deposited with the escrow agent for purposes of determining whether Contractor has fulfilled its deposit obligations. Contractor will cooperate with the auditor in providing information necessary for the auditor to make such



determination subject to the auditor's execution of a reasonable and appropriate nondisclosure agreement, and shall promptly, at its expense, correct any deficiency disclosed by the audit.

25.5.4 Extension of Obligations.

The obligations of Contractor under this Article 25 shall extend to any trustee in bankruptcy, receiver, administrator or liquidator appointed for Contractor, to Contractor as debtor-in-possession (collectively referred to in this Article as "trustee"), and to any other successor in interest to Contractor. Without limiting the generality of the foregoing, upon written request of Owner, Contractor shall not interfere with the rights of Owner as provided in the Contract or the Escrow Agreement to obtain the Escrow Materials from the Trustee or any other person or entity having possession thereof, and shall, if requested under the conditions specified in the Escrow Agreement for release of the Escrow Materials, cause a copy of such Escrow Materials to be made available to Owner.

26. INDEMNIFICATION

26.1 Contractor agrees to fully defend, indemnify and hold harmless the Indemnified Parties from and against any third party claims, losses, liabilities (including without limitation environmental liabilities), penalties, fines, damages, demands, causes of action, suits, judgments, investigations, legal or administrative proceedings, costs and expenses incidental thereto, (including costs of attorneys', accountants' and expert witness fees and costs) (collectively "Costs" for purposes of this Article) of whatsoever nature, character or description arising out of, relating to or resulting from:

- (a) Any errors, omissions, inconsistencies, inaccuracies, deficiencies or other defects in the design documents furnished by Contractor, regardless of whether such errors, omissions, inconsistencies, inaccuracies, deficiencies or other defects were also included in documents provided by Owner, if any;
- (b) The breach or alleged breach of or failure or alleged failure to perform the Contract or any subcontract thereunder by any Contractor-Related Entity, including but not limited to its obligation to perform the Work in compliance with Applicable Laws;
- (c) The failure or alleged failure by any Contractor-Related Entity to comply with any Applicable Law;
- (d) The negligent act, omission, misconduct, or fault, or the alleged negligent act, omission, misconduct, or fault, of any Contractor-Related Entity;
- (e) The injury, or death of any person, including but not limited to any of Contractor's employees, agents or Subcontractors, or damage to or loss (including loss of use) of any private party, including property of the Parties hereto, arising out of or in any degree directly or indirectly caused by or resulting from supplies, material, Deliverables, products or equipment supplied by, or from activities of, or work performed by any Contractor-Related Entity;
- (f) Any service or design, or product called for in any service or design, provided by any Contractor-Related Entity that infringes or allegedly infringes any patent,



copyright, trademark, service mark, trade dress, utility model, industrial design, mask work, trade secret or other proprietary right of a third party;

- (g) Any and all claims by any Governmental Person claiming taxes based on gross receipts, purchases or sales, the use of any property or income of any Contractor-Related Entity with respect to any payment for the Work made to or earned by such Contractor-Related Entity under the Contract;
- (h) Any and all stop notices and/or liens filed in connection with the Work, including all expenses and attorney's fees incurred in discharging any stop notice or lien, provided that the Owner is not in default in payment owing to Contractor with respect to such Work; or
- (i) The claim or assertion by any contractor of inconvenience, disruption, delay or loss caused by any Contractor-Related Entity interfering with or hindering the progress or completion of work being performed by other contractors or failure of any Contractor-Related Entity to cooperate reasonably with other Contractors.

26.2 As part of Contractor's indemnification obligations under Article 26.1(e), Contractor shall pay any and all costs of such defense and settlement (including interest, fines, penalties, costs of investigation, costs of appeals, and attorney's fees) and will pay any and all costs and damages finally awarded against any of the Indemnified Parties. Owner shall have the right to employ separate counsel and participate in its defense. No settlement pertaining to Owner's right to use the Deliverables as provided herein shall be made without Owner's prior written consent.

In the event that any Deliverable furnished hereunder, or called for in any design or services provided under this Contract, is in any suit, proceeding, or judgment held to constitute an infringement on any third party's right, and its use is enjoined, Contractor shall use its best efforts immediately, and at its own expense to accomplish the following:

- (a) Procure the fully paid-up, irrevocable and perpetual right for Owner to continue using the Deliverable;
- (b) Modify the Deliverable; or
- (c) Provide for the replacement of the Deliverable with an alternative product that is functionally equivalent to the Deliverable.

If Contractor is unable to provide Owner with one of the forms of relief described above, Contractor shall also reimburse to Owner the total paid by Owner for the Deliverable that is held to constitute an infringement.

26.3 In addition to the foregoing and to the full extent permitted under Applicable Law, Contractor shall repair or replace any property of Owner which is damaged by its employees, agents or Subcontractors while performing work hereunder.

26.4 The indemnification obligations under this Article 26 shall not be limited by the existence of any insurance policy procured or maintained by Contractor or by any limitation on the amount or type of damages, compensation or benefits payable by or for Contractor or any Subcontractor and shall survive the termination of the Contract.

26.5 The following restrictions shall apply to the indemnities set forth in this Article 26:



- (a) With respect to any loss, damage or cost of the type covered by the insurance required to be provided hereunder, Contractor's indemnity obligation shall not extend to any loss, damage or expense arising from the sole negligence or willful misconduct of such Indemnified Party or its agents, servants or independent contractors who are directly responsible to such Indemnified Party;
- (b) With respect to any loss, damage or cost which is not of the type covered by the insurance required to be provided hereunder, Contractor's indemnity obligation shall not extend to any loss, damage or cost to the extent that such loss, damage or cost was caused by the gross negligence or willful misconduct of such Indemnified Party or its agents, servants or independent contractors who are directly responsible to such Indemnified Party;
- (c) Such indemnities shall not be construed to effect any extension of statutes of limitations otherwise applicable to causes of action for breach of Contract held by Owner against Contractor; and
- (d) In claims by an employee of Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under this Article 26 shall not be limited by a limitation on the amount or type of damages, compensation or benefits payable by or for Contractor or a Subcontractor under workers' compensation, disability benefit or other employee benefits laws.

27. SUBCONTRACTORS, SUBCONTRACTS AND OTHER CONTRACTS FOR THE WORK

- 27.1** All references to Subcontractors herein include Subcontractors at any tier. Nothing contained in the Contract or any contract with a Subcontractor at any tier shall create any contractual relationship between Owner and any Subcontractor, or any third-party beneficiary rights in any Subcontractor; provided, however, that Owner shall be named as a third party beneficiary of all contracts with a Subcontractor.
- 27.2** Notwithstanding any Subcontract or agreement with any Subcontractor, Contractor shall be fully responsible for all of the Work. Defaults or delays in performance of the Work by Contractor which are caused by Subcontractors shall not relieve Contractor of its obligations.
- 27.3** Contractor shall be responsible for all coordinating the Work performed by Subcontractors.
- 27.4** Contractor shall not contract with a proposed person or entity to which Owner has made reasonable and timely objection.
- 27.5** If Owner has a reasonable objection to a person or entity proposed by Contractor, Contractor shall propose another person or entity to which Owner or Contractor has no reasonable objection.
- 27.6** Notwithstanding Article 27.4, Contractor must obtain Owner's written approval of any proposed Person which will:
 - (a) provide any Safety Critical systems, subsystems or components, systems or parts of the Trainsets; or



- (b) perform any aspect of the Work over an aggregate value of \$1,000,000.
- 27.7** Contractor shall not change a Subcontractor, person or entity previously selected if Owner makes reasonable objection to such change.
- 27.8** All Subcontracts shall include the required flow down provisions set forth in Article 2 of the Supplemental General Provisions.
- 27.9** All Subcontracts shall also contain provisions that:
- (a) Preserve and protect the rights of Owner under the Contract with respect to the Work to be performed under the Subcontract so that the subcontracting thereof shall not prejudice such rights;
 - (b) Require that such Work be performed in accordance with the requirements of the Contract;
 - (c) Require submission to Contractor of applications for payment under each Subcontract to which Contractor is a party, in reasonable time to enable Contractor to apply for payment;
 - (d) Require that all claims for additional costs, extensions of time, damages for delays or otherwise with respect to subcontracted portions of the Work shall be submitted to Contractor (via any Subcontractor where appropriate) in sufficient time so that Contractor may comply in the manner provided in the Contract for like Claims by Contractor upon Owner;
 - (e) Require that each Subcontractor be named as additional insured under the insurance policies required to be carried by Contractor pursuant to Article 35 and require that Owner be named as an additional insured under the policies carried by the Subcontractor, and that such policies contain a waiver of subrogation against Owner, to the extent that the corresponding policies carried by Contractor are required to name Owner as an additional insured or include such a waiver;
 - (f) Preclude Contractor and Subcontractor from naming, impleading or otherwise including Owner as a party in any arbitration or lawsuit between Contractor and any Subcontractor, and preclude the Subcontractor from naming, impleading or otherwise including Owner in any arbitration or lawsuit arising as a result of any Work performed by or for Contractor under the Contract;
 - (g) Provide that Contractor's rights under the Subcontract shall be assignable to Owner at Owner's option;
 - (h) Require the Subcontractor to continue diligently to prosecute the Work, notwithstanding any disputes, including without limitation, disputes between Contractor and Owner, or Contractor and any Subcontractor;
 - (i) Provide that the Subcontract is terminable on the same terms as the Contract, but that no termination shall be effective without Owner's consent, and the Work covered by the Subcontract may be suspended on the same terms as the Work may be suspended pursuant to the Contract;
 - (j) Include Owner as a named indemnitee under any indemnification obligations imposed on the Subcontractor; and



- (k) Obligate each Subcontractor specifically to consent to the provisions of this Article 27.

- 27.10** Whenever the Contract: (i) requires Contractor to include any provisions in an agreement with a Subcontractor, or (ii) requires Contractor to bind a Subcontractor to any obligation or otherwise create any obligation, responsibility, or liability on the part of any Subcontractor, or (iii) confers any rights or benefits on Owner with respect to a Subcontractor, the reference to "Subcontractors" shall be deemed to include Subcontractors of any tier, and Contractor shall require Subcontractors to include in all agreements with their suppliers: (a) provisions parallel to those required to be included in the agreement with the Subcontractor, (b) provisions necessary and sufficient to impose parallel obligations, responsibilities and liabilities on the Subcontractors, and (c) provisions necessary to confer such rights and benefits on Owner with respect to their suppliers.
- 27.11** Contractor shall furnish Owner with one copy of all executed subcontracts associated with the Contract, including any changes or modifications to subcontracts, within 3 days after their execution. Owner may, in its sole discretion, request Contractor to provide Owner with additional copies of all executed subcontracts associated with the Contract.
- 27.12** Contractor shall pay each Subcontractor under this Contract for the satisfactory performance of its Subcontract no later than seven days from receipt of each payment Contractor receives from Owner. Contractor shall, by appropriate agreement with each Subcontractor, require each Subcontractor to make payments to its own Subcontractors in a similar manner. Owner shall have no obligation to pay or to see to the payment of money to a Subcontractor, except as may otherwise be required by Applicable Law.
- 27.13** Within ten days after execution of the Contract, Contractor shall furnish Owner, in writing, an accurate itemized labor and material cost schedule showing all proposed Subcontractors' names, addresses, telephone numbers and nature of Work. In addition, Contractor shall furnish the names of all persons or entities proposed as suppliers of the products identified in the Performance Specification (including those who are to furnish materials or equipment fabricated to a special design) and, where applicable, the name of the installing Subcontractor. Owner shall within 30 days reply to Contractor, in writing, stating whether or not Owner, after due investigation, approves such proposed person or entity. Failure of Owner to reply within such period shall constitute notice of no reasonable objection.
- 27.14** If any part of Contractor's Work is dependent in any way on the work of any other separate Owner contractor, Contractor shall take all reasonable steps to become aware of any defects in the work of such other contractors that renders or would render such work unsuitable for proper execution of Contractor's Work. Contractor shall inspect the critical items of any such contractor's work before relying on or incorporating such work into Contractor's Work. If Contractor reasonably believes that another contractor's work is deficient or otherwise unsuitable for its intended purpose, Contractor shall notify Owner, in writing, immediately upon such discovery. Contractor shall waive its right to any claims regarding the unsuitability of such other contractor's work if Contractor fails to timely notify Owner of any defects in such other contractor's work that Contractor discovered or reasonably should have discovered.
- 27.15** Should any Contractor-Related Entity cause damage to the work or property of any separate Owner contractor, Contractor shall, upon due notice, make all reasonable efforts to settle with such other contractor(s).



28. SMALL AND DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

Contractor shall comply with Owner's Small and Disadvantaged Business Enterprise Program attached to the General Provisions as Schedule 9. For the Contract, there is a Small Business utilization goal of 30 percent. Contractor shall also comply with 41 C.F.R. Part 60, Best Practices of 49 C.F.R. Part 26, Executive Order 11246, and Title VI of the Civil Rights Act of 1964 and related statutes.

For more detailed information regarding small business utilization reporting, substitution/termination processes, prompt payment provisions, recognized small business roster of certifying agencies and other performance related factors, refer to the Small and Disadvantaged Business Enterprise Program, located in Schedule 9 to the General Provisions.

Contractor shall establish and implement a Small Business Performance Plan to address how Contractor will meet the utilization goal set forth above. Contractor shall submit its Small Business Performance Plan to Owner within 30 days after issuance of the first NTP. The Small Business Performance Plan shall be subject to concurrence by Owner. If requested by Owner, Contractor shall revise its Small Business Performance Plan to incorporate Owner's comments. Contractor is directed to refer to Owner's Small and Disadvantaged Business Enterprise Program for direction in what components are to be included in Contractor's Small Business Performance Plan.

29. CLAIMS

A "Claim" is a demand or assertion by one of the Parties seeking: (1) an adjustment or interpretation of Contract terms; (2) payment of money; (3) an extension of the Contract Time; (4) other relief with respect to the terms of the Contract. Any Claim that Contractor may have against Owner arising out of the Contract must be presented in writing to Owner not later than sixty days after Contractor knew or should have known of thirty days after the first occurrence of the circumstance that gave rise to the Claim. The Claim shall contain a concise statement of the question or dispute and the relevant facts and data (including the applicable Contract provision) that support the Claim. Contractor shall furnish any additional information that Owner may require to enable it to evaluate and decide the Claim.

- 29.1** Any Claim by Contractor shall first be submitted to Owner. Owner shall issue a decision on the Claim within 60 days after receiving the written Claim and all supporting data and documentation. A decision from Owner shall be a condition precedent to pursuing relief under this Article.

In the event the Parties are unable to settle a Claim within 30 days from Owner issuing a decision pursuant to this Article 29.1, the Parties may attempt to resolve the Claim through direct discussions between the Chief Operating Officer of Owner and the Chief Operating Officer of Contractor, or their respective designees. Such persons shall confer as often as they deem reasonably necessary to discuss the Claim and negotiate in good faith toward resolution. The specific format for the discussions shall be left to the discretion of such representatives, but may include the preparation of agreed-upon statements of fact or written statements of position. If requested by Contractor, such discussions shall take place within 60 days after such request.

- 29.2** If any Claim arising under the Contract is not settled by agreement of the Parties pursuant to this Article 29, either Party may refer the Claim to the DRB; provided,



however, that Contractor must refer the Claim to the DRB within 90 days from Owner issuing a decision pursuant to Article 29.1.

A standing DRB will be established to assist in the resolution of Claims, including Claims arising out of the Work of this Contract. This Article 29 describes the purpose, procedure, function, and key features of the DRB. A 3-party agreement, in the form provided in the Signature Document, shall be executed by Owner, Contractor and members of the DRB for the purpose of formalizing the creation of the DRB.

The DRB will assist in and facilitate the timely and equitable resolution of Claims between Owner and Contractor in an effort to avoid delay in the progress of the Work and litigation. It is not intended for Owner or Contractor to default on their normal responsibility to amicably and fairly settle their differences by indiscriminately referring them to the DRB. Owner and Contractor shall attempt to resolve potential Claims without resorting to the DRB procedures.

The DRB shall fairly and impartially consider Claims referred to it, and shall provide written decisions to Owner and Contractor to assist in the resolution of these Claims.

29.3 The following matters (collectively, “Ineligible Matters”) are ineligible for resolution through the DRB procedures specified in this Article 29:

- Any matters that the Contract expressly states are final, binding or not subject to dispute resolution;
- Any matters relating to the scope or applicability of indemnities provided under the Contract;
- Any Claim for injunctive relief;
- Any Claim against an insurance company, including any Subcontractor Claim that is covered by insurance;
- Any Claim arising solely in tort;
- Any Claim involving a third party which is a necessary or appropriate party to such dispute, including any related claims between the Parties arising therefrom;
- Any Claim regarding failure to comply with equal employment opportunity requirements or requirements of the Contract relating to Small Business Enterprises, and Disadvantaged Business Enterprises;
- Any Claim for, or Claim based on, remedies expressly created by statute; and
- Any Claim that is actionable only against a surety.

29.4 The DRB will consist of one member selected by Owner, who shall be a professional engineer and approved by Contractor, one member selected by Contractor, who shall be a professional engineer and approved by Owner, and a third member selected by the first two members who shall be an attorney and approved by both Owner and Contractor. The third member will act as Chairperson for all DRB activities.

All DRB members shall be experienced with the type of Work involved in this Contract, and the interpretation of the Contract. The goal in selecting the third member is to complement the experience of the first two DRB members and to provide leadership for the DRB's activities. It is imperative the DRB members show no partiality to either Contractor or Owner, or have any conflict of interest.



The following provide the criteria and limitation for membership on the Dispute Resolution Board:

- No member shall be a Contractor-Related Entity of or otherwise have a financial interest in Contractor, any Subcontractor, the California High-Speed Train Project or in the outcome of any Claim decided hereunder, except for payment for services on the DRB.
- Except for fee-based consulting services on other projects, no member shall have ever been previously employed by Owner, Contractor or any Contractor-Related Entity (including any work for such entity through an arrangement with his or her direct employer), except for fee-based consulting services on other projects which are disclosed to the Parties, and no member shall have otherwise had financial ties to any Party during the two years preceding his or her engagement for the DRB.
- No member shall have had a professional or personal relationship, with Contractor, any Subcontractor, Owner, or an employee of any of the foregoing of a nature which could affect his/her ability to impartially resolve Claims.
- No member shall have had substantial prior involvement in the California High-Speed Train Project of a nature which could affect his/her ability to impartially resolve Claims.
- No member shall have a conflict of interest.

Refer to the form of DRB Agreement in Attachment I to the Signature Document for additional limitations applicable to DRB members.

29.5 Before their appointments are final, the first two prospective members shall submit complete disclosure statements for the approval of both Owner and Contractor. Each statement shall include:

- A resume of experience;
- A declaration describing all past, present, and anticipated or planned future relations to this Contract and the Project, and with all entities involved in the design and construction of the Project, as well as any other possible or potential Conflict of Interest;
- Disclosure of all relationships with any Parties or persons otherwise involved in the Work; and
- A statement that the member meets all criteria applicable to DRB members as specified in the form of DRB Agreement set forth in Attachment I to the Signature Document.

The third DRB member shall supply a similar statement to the first two DRB members and to Owner and Contractor before his or her appointment is final.

The duty to disclose conflicts of interest shall be continuing. Members of the DRB shall promptly notify Owner and Contractor not only of any possible or potential conflict of interest that exists at the time they are appointed to the DRB, but also any possible or potential conflict of interest that they become aware of while they are serving on the DRB.

During each DRB member's tenure on the DRB, neither Party shall employ such DRB member nor contact such DRB member regarding employment, other than as a DRB member; nor shall either Party contact any individual DRB member in an ex



parte manner to seek advice or consultation during job site meetings described below or at any other time. If either Party makes such inappropriate contact with a DRB member, the DRB member shall be expected to report such contact to the other Party, and the other Party may in its sole discretion terminate the DRB process. If the DRB process is terminated because of inappropriate contact, the contacting Party shall reimburse the non-contacting Party for all costs incurred to date in the DRB process. The DRB process shall then commence anew from the beginning with the selection of all new members.

Owner and Contractor shall each select and negotiate an interim agreement with their respective member within six weeks after award of this Contract. Immediately after approval, Owner and Contractor shall notify their members to begin selection of the third member. The first two members shall ensure that the third member meets all of the criteria listed above. The third member shall be selected within four weeks after the first two members are notified to proceed with his or her selection. In the event of an impasse in selection of the third member, that member shall be selected by mutual agreement of Owner and Contractor. In so doing, they may, but are not required to, consider the nominees offered by the first two members.

Within a reasonable time after selection of the third member, Owner, Contractor, and all three members of the DRB shall execute a three-party agreement in the form provided in Attachment I to the Signature Document.

29.6 The DRB shall formulate its own rules of operation consistent with the terms and conditions specified herein. It is not desirable to adopt hard and fast rules for the functioning of the DRB. The entire procedure shall be kept flexible to adapt to changing situations. The DRB shall initiate, with Owner's and Contractor's concurrence, new rules or modifications to old ones whenever this is deemed appropriate. In order to keep abreast of construction developments and progress, the DRB members will be promptly informed of construction activities by means of regular written progress reports and other relevant data prepared by Contractor and approved by Owner. The DRB shall meet with representatives of Owner and Contractor at intervals as requested by Owner and Contractor, and at times of critical construction events. The frequency of these meetings shall be as agreed among Owner, Contractor, and the DRB, depending on the progress of the Work. Each meeting shall consist of an informal round table discussion followed by field inspection of the Work. The round table discussion shall be attended by selected personnel from Owner and Contractor. The agenda shall generally include the following:

- Meeting convened by the chairperson of the DRB
- Opening remarks by Owner
- A description by Contractor of:
 - The Work accomplished since the last meeting
 - The current status of the work schedule
 - The schedule for future work
 - Potential Claims; and proposed solutions for these problems.
- A description by Owner of:
 - The Work accomplished since the last meeting
 - The current status of the work schedule
 - The schedule for future work



- Potential disputes, claims, and other controversies; and proposed solutions for these problems
- Set tentative date for the next Project visit and meeting

Contractor shall prepare minutes of the meetings and circulate them for any comments, revisions, and approval of all concerned. The field inspection covering all active segments of the Work shall occur after the meeting. The DRB shall be accompanied by representatives of both Owner and Contractor at all times during the field inspection.

29.7 Claims shall be considered as quickly as possible, taking into consideration the particular circumstances and the time required to prepare detailed documentation. If agreed by Owner, Contractor and DRB members in writing, steps may be omitted and the time periods stated below may be shortened in order to hasten resolution. Contractor may submit a Claim to the DRB only after obtaining a decision from Owner, as set forth in Article 29.2. Owner may refer a Claim to the DRB at any time.

29.8 A Statement of Dispute shall be submitted to the DRB separately by Owner and Contractor stating clearly and in full detail the specific issues of the dispute and its position. Simultaneous with submittal to the DRB, a copy of the Statement of Dispute shall be provided to the other Party.

When a dispute is referred to the DRB, it shall first be decided when to conduct the hearing. If the matter is not urgent, it may be heard at the next scheduled DRB meeting. For an urgent matter, the DRB shall meet at its earliest convenience.

Once a dispute is referred to the DRB, discovery shall be permitted to the full extent provided by Code of Civil Procedure sections 1283.05(a) through (d); provided that the Parties may agree to shorten the discovery period for individual disputes.

The DRB may request that written documentation and arguments in addition to the Statements of Dispute be submitted by either Party or both Parties to each DRB member before the hearing begins.

Normally the hearing will be conducted at the Site. However, any location that would be more convenient and still provide all required facilities and access to necessary documentation is satisfactory as determined at the sole discretion of the DRB. Private meetings of the DRB may be held at any convenient location.

The third member of the DRB will act as chair of the hearing. Each member shall keep his or her own notes, and a formal transcript will normally not be prepared. Audio or video recordings will normally not be used. The decision to keep a formal transcript or use audio or video recordings shall be at the sole discretion of the DRB.

Owner and Contractor shall have representatives at all hearings. Contractor shall first discuss the dispute, followed by Owner. Each Party will then be allowed successive rebuttals until all aspects are fully covered. The DRB members may ask questions, request clarification, or ask for additional data. Additional hearings may be necessary if ordered by the DRB in its sole discretion if determined necessary to consider and fully understand all the evidence presented by both parties. Both Owner and Contractor shall be provided full and adequate opportunity to present all of their evidence, documentation, and testimony regarding all issues before the DRB.

During the hearings, no DRB member shall express any opinion concerning the merit of any facet of the dispute. After the hearings are concluded, the DRB shall meet to



formulate its decision. After the hearings are concluded, the DRB shall meet to formulate its decision. All DRB deliberations shall be conducted in private, with all individual views kept strictly confidential. The DRB's decision, together with a detailed explanation of its reasoning, shall be submitted as a written report to both Parties. The decision shall be based on the pertinent Contract provisions, Applicable Laws, and the facts and circumstances set forth in the record of the dispute.

The DRB shall make every effort to reach a unanimous decision. If this proves to be impossible, the dissenting member shall prepare a written minority report.

29.9 For purposes of this "Claims" clause, a "Subcontractor Demand" shall include any claim by a Subcontractor (including also any pass-through claims by a lower tier Subcontractor) against Contractor that is actionable by Contractor against Owner and arises from work, services or materials provided or to be provided under the Contract. If Contractor determines to pursue a claim against Owner that includes a Subcontractor Demand, the following additional conditions shall apply:

- Contractor shall identify clearly in all submissions pursuant to this "Claims" clause, that portion of the claim that involves a Subcontractor.
- Contractor shall include, as part of its submissions pursuant to this "Claims" clause, a certification in a form acceptable to Owner by the Subcontractor's officer, partner or authorized representative with authority to bind the Subcontractor and with direct knowledge of the facts underlying the Subcontractor's claim. Contractor also shall submit a Contractor's certification that:
 - Contractor has investigated the basis of the Subcontractor's claims and has determined that all such claims are justified as to entitlement and amount of money and time requested, and has reviewed and verified the adequacy of all back-up documentation;
 - Subcontractor's claim has been prepared and submitted in accordance with the terms of the Contract and the applicable Subcontract(s) and contains all information required by Contract and applicable Subcontract; and
 - Contractor has no reason to believe and does not believe that the factual basis for the Subcontractor's claim is falsely represented.
- Any claim under this "Claims" clause involving Subcontractor Work shall be considered incomplete if it is not accompanied by such analysis and certification.
- At any DRB hearing on a dispute that includes one or more Subcontractor Demands, Contractor shall require that each Subcontractor that is involved in the dispute have present one or more authorized representatives with actual knowledge of the facts underlying the Subcontractor's claim to assist in presenting the Subcontractor's claim and to answer questions raised by the DRB members or Owner's representatives.
- Failure of Contractor to assert a Subcontractor's claim on behalf of any Subcontractor or supplier at the time of submitting a Claim to Owner as provided in Article 29.1, shall constitute a release of Owner by Contractor on account of such Subcontractor's claim.

Contractor shall require in all Subcontracts that all Subcontractors and suppliers of any tier:



- agree to submit Subcontractor's claims to Contractor in a proper form and in sufficient time to allow processing by Contractor in accordance with this "Claims" clause;
 - agree to be bound by the terms of this "Claims" clause to the extent applicable to Subcontractor's claims;
 - agree that, to the extent a Subcontractor's claim is involved, completion of all steps required under this "Claims" clause shall be a condition precedent to pursuit by the Subcontractor of any other remedies permitted by Law;
 - agree that any Subcontractor's claim brought against a bonding company, that also is actionable against Owner through Contractor, shall be stayed until completion of all steps required under this "Claims" clause; and
 - agree that the existence of a dispute resolution process for involving Subcontractor's Demands shall not be deemed to create any claim, right or cause of action by any Subcontractor or supplier against Owner.
- Notwithstanding the foregoing, this "Claims" clause shall not apply to, and the DRB shall not have the authority to consider:
 - any Subcontractor claim between the Subcontractor(s) and Contractor that is not actionable by Contractor against Owner;
 - any Subcontractor claim based on remedies expressly created by statute;
 - any Subcontractor claim that is covered by insurance; or
 - any Subcontractor claim that is actionable only against a bonding company.

29.10 The DRB's initial decision for resolution of the dispute will be reasoned and given in writing, to both Owner and Contractor, within two weeks of completion of the hearings. This time may be extended by mutual agreement of Parties. If requested by either Party, the DRB shall meet with Owner and Contractor to provide additional clarification of its decision.

Within two weeks of receiving the DRB's initial decision, or such other time as agreed by the DRB and the Parties, both Owner and Contractor may respond to the other and to the DRB in writing, signifying either acceptance or rejection of the DRB's decision. The failure of either Party to respond within the specified period shall be deemed an acceptance of the DRB's initial decision. If, with the aid of the DRB's initial decision, Owner and Contractor are able to resolve their dispute, Owner will promptly process any required Contract changes.

Should the dispute remain unresolved, the DRB will consider the responses of the Parties and, within four weeks of issuance of the initial DRB decision, the DRB shall issue a final decision which shall either uphold its initial decision or amend the decision as the DRB may determine appropriate. The final decision of the DRB shall be final and binding on the Parties for all disputes where the amount in controversy is less than or equal to \$1,000,000. If the amount in controversy exceeds \$1,000,000, the final decision of the DRB shall be final and binding unless either Party provides notice of intent to appeal the DRB final decision to arbitration to the other Party within 42 days after the issuance of the DRB final decision. If neither Party gives notice of intent to appeal the DRB final decision to arbitration within the period of 42 days, the DRB final decision shall be final and binding on the Parties. If the Party that provided



notice of intent to appeal fails to submit the dispute to arbitration as provided in Section 52 within 180 days after the date the DRB final decision becomes final, then the DRB final decision shall be final and binding on the Parties.

- 29.11** Contractor shall prepare and mail the regular written progress reports and other relevant data it provides to the DRB members and Owner. Contractor will provide conference facilities for DRB meetings and hearings.

If the DRB desires special services, such as legal consultation, accounting data, research, and the like, the Parties must agree prior to expenses being incurred for such services. Owner and Contractor shall share the cost equally.

Contractor shall pay the invoices of the DRB members, after both Parties agree to the amounts, and for special services for the DRB. Contractor shall then invoice Owner for 50 percent of the invoices of the DRB and the cost of the special services. Submittal of invoices for 50 percent of the cost of services provided and for such other special services as are mutually agreed upon shall be submitted as a Change Order, and shall not include mark-up of any kind.

- 29.12** No Party shall be precluded from initiating a proceeding in a court of competent jurisdiction for the purpose of obtaining any emergency or provisional remedy which may be necessary, and which is not otherwise available under this Article 29, to protect its rights including temporary and preliminary injunctive relief, attachment, claim and delivery, receivership, and any extraordinary writ.

- 29.13** If the Parties cannot resolve claims informally or through the DRB process, then either Party shall have the right to bring unresolved Claims where the amount in controversy exceeds \$1,000,000 to mandatory binding arbitration in accordance with this "Arbitration" clause, provided that the matters identified in Article 29.3 as "Ineligible Matters" shall also be ineligible for resolution through arbitration. Unless the Parties otherwise agree in writing, as a condition precedent to the right to bring a claim to arbitration, either Party electing to bring a matter to arbitration shall first have attempted to resolve the matter informally in accordance with Article 29.1 and before the DRB if applicable. Any such arbitration proceeding shall be de novo.

The Party requesting arbitration shall file notice of the demand for arbitration in writing with the other Party within 180 days after the date the DRB final decision is rendered.

Within 30 days after delivery of the request for arbitration, the Parties shall seek to jointly appoint a panel of three arbitrators who have at least ten years experience in complex construction disputes involving public works transportation projects. For any insurance disputes that are subject to arbitration, at least one of the arbitrators shall be experienced with regard to insurance coverage underwriting. Each Party shall appoint one arbitrator of its choosing, and jointly appoint a mutually agreeable third arbitrator, all of whom shall meet the foregoing qualifications. If any Party fails to select one arbitrator of its choosing who meets the foregoing qualifications, or if the Parties are unable to agree upon the selection of the third arbitrator, within such 30-day period, then either party may petition the Superior Court of Sacramento County to select such arbitrator(s) meeting the foregoing qualifications.

Unless the Parties agree otherwise, arbitrations shall be conducted in accordance with the procedures for arbitrations under Public Contract Code sections 10240 et seq. (the "State Arbitration Act"), and implementing regulations set forth in California Code of Regulations, Title 1, Chapter 4, sections 1300 et seq.



The decision of the arbitrators shall be based upon the relevant facts, circumstances and equities of the case, as well as the pertinent provision(s) of the Contract and Applicable Law, and shall be set forth in writing.

The arbitrators shall not have the power to award punitive damages, rescind this Contract, reform the Contract, or void any limitations on liability contained in this Contract.

The prevailing party in arbitration shall be awarded its reasonable investigation costs, attorneys' fees, court costs, expert witness costs, consultant's costs and other reasonable costs attendant to the arbitration. The arbitration panel will be specifically required to name the prevailing party pursuant to the award. However, if the award is simply monetary, the award shall be a single lump sum award and shall not separate the damages from the costs.

The decision of the arbitrators shall be binding on the Parties and judgment on the award rendered by the arbitrators may be entered in the Superior Court of California for Sacramento County.

29.14 During the resolution, DRB process, arbitration, or litigation of any and all claims, disputes and other matters in question arising out of or relating to this Contract, the breach thereof or provision of construction work, Contractor shall be required to continue to progress the Work to completion and comply with all other terms and provisions of this Contract in a diligent, timely and faithful manner, unless otherwise excused in writing by Owner.

29.15 It is expressly agreed by the Parties that the DRB final decision rendered prior to the notice of intent to appeal the DRB final decision to arbitration shall be admissible in any subsequent arbitration proceeding by either Party.

29.16 In the event Contractor fails to file a written objection or to appeal a decision by Owner within the time periods specified herein, or if Contractor fails to refer the Claim to the DRB within the specified time period, Contractor shall be deemed to have waived any and all rights it may have to object to or to seek DRB review of such decision, action, or order. This waiver shall occur whether or not there is any showing of prejudice to Owner resulting from the delay in filing the objection.

30. ASSIGNMENT OF CLAIMS

Claims for moneys due or to become due Contractor from Owner under the Contract may be assigned to a bank, trust company, or other financing institution, including any Federal lending agency upon Owner's prior written consent, and may thereafter be further assigned and reassigned to any such institution upon Owner's prior written consent. Any such assignment or reassignment shall cover all amounts payable under the Contract and not already paid, and shall not be made to more than one party except that any such assignment or reassignment may be made to one party as agent or trustee for two or more parties participating in such financing.

31. SUCCESSORS AND ASSIGNS

31.1 The Contract is for the professional services of Contractor and its particular qualifications, innovations, skills and abilities for performing the Contract. Accordingly, Contractor shall not assign the Contract nor delegate its responsibility under the Contract, in whole or part, without the written consent of Owner in Owner's sole discretion. Contractor shall not assign any moneys due or to become due to



Contractor under the Contract, except as provided in this Article 31. For the purpose of this paragraph, Owner will not unreasonably prohibit Contractor from freely assigning its right to payment, provided that Contractor remains responsible for all its obligations hereunder.

- 31.2** Owner, at its election and without any need for Contractor's consent, may assign its rights and delegate its responsibilities, in whole or in part, under the Contract (including rights under required insurance policies, letter(s) of credit, Guaranties and change orders), (i) to any entity that is or will be the operator of the Trainsets, and its successors and assigns, (ii) any entity succeeding to all or substantially all of Owner's powers and authority respecting the high speed rail system or its operations, or (iii) to any entity providing maintenance and/or financing for the Trainsets.

32. CUSTOM DUTIES

- 32.1** Contractor agrees that, if supplies are shipped F.O.B. (Free on Board) destination or D.D.P. (Delivered Duty Paid), Contractor shall be the importer of record for all articles that enter into the United States in connection with the Contract. Contractor shall be liable for all duties, fees, and taxes attaching on importation of such articles, including anti-dumping and countervailing duties, if any.
- 32.2** Contractor agrees that, if supplies are shipped F.O.B. origin, C.I.F. (Cost, Insurance & Freight) or F.C.A. (Free Carrier), Owner shall specify the customs broker and shall be the importer of record for all articles that enter into the United States in connection with the Contract.
- 32.3** Owner shall not pay on behalf of Contractor, or reimburse Contractor for any anti-dumping or countervailing duties for which Contractor may be liable.

33. EXPORT CONTROLS

- 33.1** Contractor represents and warrants that it shall comply with (1) all United States export laws and regulations issued by any U.S. government authority, including without limitation the U.S. Export Administration Regulations ("EAR"), the International Traffic in Arms Regulations and any regulations administered by the Department of the Treasury's Office of Foreign Assets Control, that govern the export or re-export of any Deliverable, technology or technical data provided hereunder, including software, hardware, equipment, documentation, specifications, drawings, and schematics (collectively, the "Products") and any of the services, and (2) any Applicable Laws from countries other than the United States that govern the importation, use, export or re-export of Products and/or services. Contractor further represents and warrants that it shall (1) obtain appropriate export authorizations, consents or licenses that may apply to Contractor's export or import of any Products or services, and (2) comply with any conditions that are contained in any export or import licenses pertaining to the Products or services. Contractor shall comply with any reporting requirements that may apply to the export or re-export of the Products and/or services and provide to Owner and the appropriate Governmental Person any periodic reports containing such information as may be required under Applicable Law.
- 33.2** In relation to the activities described in Article 33.1, each Party will reasonably cooperate with the other in making the appropriate filings with any Governmental Person and will, to the fullest extent permitted by law, provide any information, certificates or documents as are reasonably requested.



- 33.3** In performing services under the Contract, Contractor warrants and represents that it shall not employ or make use of any non-U.S. person who is a citizen of country that has been designated by the U.S. Government as a “terrorist supporting country” (see Country Group E at Supplement No. 1 to EAR Part 740).
- 33.4** With the exception of commodities, software or technologies that are controlled solely for “antiterrorism” reasons under the EAR, Contractor represents and warrants that the deliverables shall not contain any export controlled technology or technical data under the export control laws or regulations unless approved by Owner in writing. At least 30 days prior to the earlier of the delivery, installation or provision of a Deliverable containing any controlled technology or technical data, Contractor shall inform Owner in writing of the EAR Export Control Classification Number(s) (“ECCN”) or the International Traffic in Arms Regulations (“ITAR”) U.S. Munitions List Classification (“MLC”) numbers applicable to such Deliverable. In addition, upon delivering or otherwise providing a deliverable with ECCN or MLC numbers, Contractor shall place the following legend, or substantially similar one, as applicable on technical data and/or Deliverable documentation:
- “WARNING – INFORMATION SUBJECT TO EXPORT CONTROL LAWS. This document or software contains information subject to the EAR [or the International Traffic in Arms Regulations (“ITAR”)]. This information may not be exported, released, or disclosed to foreign persons, whether within or outside the United States without first complying with the export license requirements of EAR [or ITAR]. Include this notice with any reproduced portion of this document. The EAR Export Control Classification Number(s) (“ECCN”) is/are [or the ITAR U.S. Munitions List Classification(s)]: _____.”
- 33.5** If the services under the Contract include the maintenance or servicing of a Product, Contractor shall be responsible for promptly informing Owner of any changes in the ECCN or MCL status of such Product until expiration or termination of the maintenance or serving period for that Product.
- 33.6** If Contractor is provided, or provided access to, any technology or technical data by or through Owner that is restricted under the export control laws or regulations, Contractor shall fully comply with any and all restrictions imposed by Owner at no additional costs.
- 33.7** Contractor is fully responsible for compliance with the provisions herein on behalf of itself and its employees, agents and Subcontractors, at any tier level, and their respective employees, agents and contractors.

34. COVENANTS AGAINST CONTINGENT FEES

Contractor warrants that no person or selling agency has been employed or retained to solicit or secure the Contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by Contractor for the purpose of securing business. For breach or violation of this warranty, Owner shall have the right to terminate the Contract without liability or, in its discretion, to deduct from the Contract Amount, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee.



35. INSURANCE

- 35.1** Without limiting Contractor's indemnification of the Indemnified Parties and subject to the provisions of this Article 35, Contractor shall procure and maintain, at its own cost and expense, and continuously maintain in full force and effect the types of insurance specified below from the commencement of the Work until the conclusion of the last Trainset Service Period for a Trainset ordered under the Contract. The requirements stated in this Article 35 shall apply to all renewal and replacement policies, unless expressly stated otherwise.

35.1.1 Workers' Compensation Insurance

A policy complying with the requirements of the statutes of the jurisdictions in which the Work shall be performed, covering all employees of Contractor. This policy shall include Employers' Liability coverage with limits of liability of not less than \$1,000,000 for each accident. Owner shall not be named as an additional insured under this policy.

35.1.2 Commercial General Liability Insurance

A policy issued to and covering liability imposed upon Contractor arising out of the Trainset design, manufacturing, and testing, and all other Work to be performed and all obligations assumed by Contractor under the terms of the Contract. Products/Completed Operations Liability, Independent Contractors Liability, Contractual Liability (with railroad exclusions deleted), and Personal Injury/Advertising Liability coverages are to be included. Owner is to be named as an additional insured with respect to operations to be performed. The policy shall contain a cross-liability endorsement. There shall be no "contractors' limitation" endorsements, as that term is defined as of May 14, 2014 in the Glossary of Insurance and Risk Management Terms published by the International Risk Management Institute, that have not been reviewed and approved by Owner. There shall be no endorsement or modification of the commercial general liability policy limiting the scope of coverage for liability assumed under an insured contract. Additional insured coverage provided under this policy shall include coverage for loss caused by acts or omissions of those acting on behalf of Contractor. Coverage under this policy shall have combined single limits for bodily injury (including disease or death) and property damage (including loss of use) of not less than \$2,000,000 per occurrence and \$4,000,000 in the aggregate and such limits shall be dedicated to this Contract and not shared with any other work of Contractor.

35.1.3 Automobile Liability Insurance

A policy issued to and covering the liability of Contractor arising out of the use of all owned, non-owned, hired, rented or leased vehicles which bear, or are required to bear, license plates according to the laws of the jurisdiction in which they are to be operated, and which are not covered under Contractor's Commercial General Liability Insurance. The policy shall name Owner as an additional insured with respect to operations to be performed in connection with the Contract, and shall contain a waiver of subrogation against Owner, its employees and agents. Coverage under this policy shall have combined single limits of liability of not less than \$1,000,000 per occurrence.

35.1.4 Railroad Protective Liability Insurance



Contractor shall provide, or cause to be maintained, any coverage as may be required by any railroad as a condition of the railroad's consent for entry onto railroad facilities or property. Such policy shall be effective during the period any Work is being performed within 50 feet of any railroad right of way. Coverage shall be written on ISO occurrence form CG 00 35 (or substitute form providing equivalent coverage) on behalf of any railroad as a Named Insured, with a limit of not less than \$25,000,000 per occurrence and an aggregate of \$25,000,000. If equivalent or broader wording is not contained in the policy form, the following endorsement must be included:

It is agreed that "Physical Damage to Property" means direct and accidental loss of or damage to all property owned by Owner and/or all property in the care, custody and control of Owner.

In addition, Endorsement CG 28 31 - Pollution Exclusion Amendment, must be included.

35.1.5 Professional Liability Insurance

A policy issued to and covering the liability of Contractor or design Subcontractor for engineering and design errors and omissions in the performance of the Contract. Contractor or design Subcontractor shall maintain such coverage from the commencement of the Work until at least three years from the conclusion of the last Trainset Service Period for a Trainset ordered under the Contract. This insurance shall have limits of liability of not less than \$10,000,000 per claim and in the aggregate. The deductible amount shall not exceed \$250,000. Owner shall not be named as an additional insured under this policy. Such policy shall provide that:

- (a) The retroactive date shall coincide with or precede Contractor's or design Subcontractor's start of work; and
- (b) The policy shall allow for the reporting of circumstances or incidents that might give rise to future claims to be made such that any claims arising subsequently shall be treated as having been made and reported during the policy term.

35.1.6 Contractor's Equipment Insurance

A policy issued to and covering Contractor's interest in the equipment used in performance of the Contract. The insurance shall provide coverage on an all-risk basis and shall have limits adequate to cover the full replacement value of the equipment. Contractor may, at its option, elect to self-insure this exposure, but in no instance shall Owner be responsible for loss or damage to Contractor's equipment.

35.1.7 Valuable Papers and Records Insurance

A policy covering loss or damage to valuable papers including blueprints, reports, surveys, designs or specifications in connection with the Contract, on an all risk basis, in an amount no less than 100% of the replacement cost of such property. This insurance shall name Owner as loss payee as its interest may appear, and contain a waiver of subrogation against Owner. The policy will provide full coverage for the specified valuable papers even if they are maintained as electronic data.

35.1.8 Excess/Umbrella Liability Insurance



A policy issued to and providing excess limits following form (providing coverage at least as broad as that provided in each primary policy required in this Article 35) for the workers' compensation (including employers' liability), commercial general liability, and automobile liability insurance required coverage set forth in this Article 35. This insurance shall have limits of liability of not less than \$200,000,000 per occurrence and in the aggregate and such limits shall be dedicated to this Contract and not shared with any other work of Contractor.

35.1.9 Environmental Liability Insurance

A policy issued to and providing contractor's pollution liability ("CPL") insurance with a total limit of liability of no less than no less than \$5,000,000 per loss and \$5,000,000 in the aggregate per policy period.

The CPL shall be obtained on an occurrence basis. If an occurrence-based form is not available, coverage may be provided under a claims-made form provided that such coverage includes an extended reporting provision of at least three years from the conclusion of the last Trainset Service Period for a Trainset ordered under the Contract. Any claims-made policy must have a retroactive date that is no more recent than commencement of the Work.

Coverage shall apply to sudden and non-sudden pollution conditions resulting from the escape or release of smoke, vapors, fumes, acids, alkalis, toxic chemicals, liquids, or gases, waste materials, or other irritants, contaminants, or pollutants. The CPL shall also provide coverage for transportation and off-Site disposal of materials and for testing, monitoring, measuring operations, or laboratory analysis.

Owner shall be a named insured under this policy. The policy shall provide cross-liability coverage or separation of insureds and shall not contain any provision or exclusion (including any so-called "insured versus insured" exclusion) the effect of which would be to prevent, bar, or otherwise preclude any insured or additional insured under the policy from making a claim which would otherwise be covered by such policy on the grounds that the claim is brought by an insured or additional insured against an insured or additional insured under the policy.

35.2 General Requirements

The insurance provided hereunder shall be available for the benefit of Contractor and any Indemnified Parties as specified herein with respect to covered claims, but shall not be interpreted to relieve Contractor of any obligations hereunder. All limits of insurance set forth below are in U.S. dollars. Each policy of insurance of the type and amounts described below shall in a form satisfactory to Owner. However, Owner's acceptance, acquiescence or failure to object to Contractor's submitted insurance policies shall in no way relieve Contractor from responsibility for obtaining insurance policies complying with the terms of the Contract. Unless otherwise specified in the Contract, all insurance required hereunder shall be procured from insurance or indemnity companies with an A.M. Best and Company rating level of A- or better, Class XIV or better and licensed to do business in the jurisdiction where Work is to be performed and with companies or through sources approved by Owner. In the event that an insurer providing any of the insurance policies becomes the subject of bankruptcy proceedings, becomes insolvent, has its rating by A.M. Best and Company decreased to a level below A-, or is the subject of an order or directive limiting its business activities given by any Governmental Person, including any State Department of Insurance, Contractor shall exercise best efforts to promptly (and even



in the middle of a policy term), and at its sole cost and expense, secure alternative coverage in compliance with the insurance requirements contained in this Article 35.

35.2.1 Premiums, Deductibles and Self-Insured Retentions

Contractor shall be responsible for payment of premiums for all insurance required under this Article 35. The Indemnified Parties have no obligation to pay any premium. Contractor further agrees that for each claim, suit or action made against any insured, Contractor shall be solely responsible for all deductibles or self-insured retentions. Any deductible or self-insured retention maintained by Contractor over \$500,000 must be declared and approved by Owner. At the option of Owner, the insurer shall either reduce or eliminate such deductible or self-insured retention with respect to the Indemnified Parties; or Owner in its good faith discretion, may require posting of collateral by Contractor guaranteeing payment of losses and related investigations, claims administration and defense expenses.

35.2.2 Subcontractor Insurance Requirements

Contractor shall cause each Subcontractor to provide and maintain such insurance that complies with the requirements of Contractor in circumstances where the Subcontractor is not covered by Contractor's insurance. Contractor shall require general liability, auto liability, and workers' compensation/employer's liability insurance of Subcontractors. Other coverages identified in this Article 35 shall be required of Subcontractors if the Work involves the specific exposure, including environmental and professional liability. Limits of insurance required of Subcontractors shall be at Contractor's discretion, but shall be consistent with custom and practice for such requirements in the area where the Work is to be performed. In most cases, limit requirements for Subcontractors shall be less than the full limits required of Contractor in this Article 35. Contractor shall cause each such Subcontractor to the Indemnified Parties as additional insureds under such Subcontractors' liability insurance policies obtained, except for any professional liability insurance. Contractor shall require each such Subcontractor to require that its workers' compensation insurers agree to waive any subrogation rights the insurers may have against the Indemnified Parties. If requested by Owner, Contractor shall promptly provide certificates of insurance or copies of policies, as requested, evidencing coverage for each Subcontractor. Owner shall have the right to contact the Subcontractors directly in order to verify the above coverage. For Certified Small Businesses, as defined by the State of California, required limits for commercial general liability and auto liability shall be \$1,000,000 each. For Subcontractors other than Certified Small Businesses, required limits for auto liability shall be no less than \$1,000,000 each. Limits shall be \$1,000,000 for Certified Small Businesses conducting Work that involves a specific exposure, such as professional liability and/or environmental liability.

35.2.3 Additional Coverage Requirements

Except for professional liability, all liability, all insurance policies required to be provided by Contractor and its Subcontractors hereunder shall contain or shall be endorsed to comply with the following provisions:

a. For claims covered by the insurance specified herein, all insurance coverage, other than policies expressly issued as excess to policies specified herein, shall be primary insurance. All insurance specified herein shall be non-contributory with respect to insurance or self-insurance maintained by the Indemnified Parties, and their respective members, directors, officers, employees, agents and consultants.



Any insurance or self-insurance beyond that specified in the Contract that is maintained by the Indemnified Parties, or their members, directors, officers, employees, agents and consultants shall be in excess of, and shall not contribute with, the insurance required herein;

b. Any failure on the part of Contractor and its Subcontractors to comply with reporting provisions or other conditions of the policies required herein, any breach of warranty, any action or inaction of Contractor and its Subcontractors shall not affect coverage provided to the Indemnified Parties and their respective members, directors, officers, employees, agents and consultants;

c. All insurance to be provided herein shall include a "cross liability" or "separation of insureds" clause and shall apply separately to each insured and additional insured against whom a claim is made or suit is brought, except with respect to the limits of the insurer's liability. No policy shall contain any provision or exclusion (including a "cross-liability," "insured versus insured" or similar exclusion) that in effect would prevent, bar, or otherwise preclude any insured or additional insured under the policy from making a claim that would otherwise be covered by such policy on the grounds that the claim is brought by an insured or additional insured against an insured or additional insured under the policy. The requirements of this subsection do not apply to claims by Contractor against any of its Subcontractors or suppliers or to claims between subcontractors and/or suppliers;

d. Each policy shall be endorsed to state that coverage shall not be suspended, voided, canceled, or reduced in coverage or in limits except after 30 days (ten days for non-payment of premium) prior written notice, has been given to Owner. Such endorsement shall not include any limitation of liability of the insurer for failure to provide such notice;

e. Endorsements adding additional insureds to required policies shall provide the broadest coverage available, but in no event less coverage than the Insurance Services Office form CG 20 10 and the CG 20 37 with no limitations or exclusions with respect to "products/completed operations" coverage for insureds or additional insureds; and

f. Each policy shall provide coverage on an "occurrence" basis and not a "claims made" basis (with the exception of professional liability) and no policy issued on an occurrence basis shall have any sunset clause requiring reporting within a specified period of time except as specified for pollution liability policies.

35.2.4 Waivers by the Parties

Contractor and Owner each waives all rights of subrogation against each other and the Indemnified Parties, against each of their agents and employees and their respective members, directors, officers, employees, agents and consultants for any claims arising out of the performance of Work under this Project to the extent covered by insurance obtained pursuant to this Article 35, except such rights as they may have to the proceeds of such insurance. Contractor shall require any Contractor-Related Entity to provide similar waivers in writing each in favor of the Indemnified Parties. The waivers required in this subsection do not apply to claims between Subcontractors and/or subconsultants of Contractor or those claims asserted by Contractor against any Subcontractors and/or suppliers.

35.2.5 No Recourse



All costs for insurance shall be considered incidental to and included in compensation allowed hereunder and no additional payment will be made by Owner.

35.2.6 Support of Indemnifications

The insurance coverage provided hereunder by Contractor shall support but is not intended to limit Contractor's indemnification obligations under the Contract.

35.2.7 Commercial Unavailability of Required Coverage

If, through no fault of Contractor, any of the coverage required in this Article 35 (or any of the required terms of such coverage, including policy limits) become unavailable or are available only with commercially unreasonable premiums, Owner will consider in good faith alternative insurance packages and programs proposed by Contractor, with the goal of reaching agreement on a package providing coverage equivalent to that specified herein. Contractor must demonstrate to Owner's satisfaction that it has used diligent efforts in the global insurance markets to place the required insurance coverages, and shall advise Owner of the specific results of those efforts. Contractor shall not be entitled to any increase in the Contract Amount for increased costs resulting from the unavailability of coverage and the requirement to provide acceptable alternatives. Owner shall be entitled to a reduction in the Contract Amount if Owner, in its sole discretion, agrees to accept alternative policies providing less than equivalent coverage.

35.2.8 Owner's Right to Remedy Breach by Contractor

Failure on the part of Contractor to maintain the insurance as required hereunder shall constitute a material breach of the Contract, upon which Owner may, after giving 5 days notice to Contractor to correct the breach, if not timely cured by Contractor, immediately terminate the Contract or, at its discretion, procure or renew such insurance and pay any and all premiums in connection therewith, with any sums so expended to be repaid to Owner on demand, or at the sole discretion of Owner, offset against funds due Contractor from Owner.

35.2.9 Insurance Proceeds and Prosecution of Claims

Under certain circumstances, insurance policies required hereunder are intended to provide compensation to Contractor for costs incurred by Contractor. Contractor shall be responsible for processing all such claims and shall not be entitled to receive a Change Order for any costs, which it could have recovered from the insurer. Contractor agrees to report timely to the insurer(s) any and all matters, which may give rise to an insurance claim and to promptly and diligently pursue any and all insurance claims, whether for defense or indemnity or both. Owner shall have the right, but not the obligation, to submit Owner's claims and tenders of defense and indemnity under applicable insurance policies. Unless otherwise directed by Owner in writing with respect to Owner's insurance claims, Contractor shall be responsible for reporting and processing all potential claims by Owner or Contractor or tenders for defense and indemnity under the appropriate insurance policies. Contractor agrees to report timely to the insurer(s) under such policies any and all matters which may give rise to an insurance claim by Contractor or Owner and to promptly and diligently pursue such insurance claims in accordance with the claims procedures specified in such policies, whether for defense or indemnity or both. Contractor shall enforce all legal rights against the insurer under the applicable insurance policies and Applicable Laws in order to collect thereon, including pursuing necessary litigation and enforcement of judgments. Contractor shall immediately notify Owner, and thereafter



keep Owner fully informed, of any incident, potential claim, claim or other matter of which Contractor becomes aware that involves or could conceivably involve an Indemnified Party as a defendant. Contractor will cooperate with Owner, and shall require its liability insurers to agree in writing to work with Owner to assure compliance with all insurance policies regarding timely response to claims. Owner agrees to promptly notify Contractor of Owner's incidents, potential claims against Owner, and matters of which Owner is aware which may give rise to an Owner insurance claim or to a right of defense and indemnification under this Article 35. Delivery of any such notice will constitute a tender of Owner's defense of the claim to Contractor and the insurer under any applicable insurance policies, subject to Owner's rights to control its own defense to the extent provided in this Article 35 or by Applicable Laws. Owner shall cooperate with Contractor as necessary for Contractor to fulfill its duties hereunder, including providing Contractor a copy of all written materials Owner receives asserting a claim against Owner that is subject to defense by an insurer under an insurance policy or by Contractor under this Article 35. If, in any instance, Contractor has breached its obligations respecting insurance coverage set forth in the Contract or is unable to enforce and collect any such insurance for failure to assert claims in accordance with the terms of the Insurance Policies or to prosecute claims diligently, then for purposes of determining damages resulting from the breach or inability to enforce or collect, on or determining reductions in compensation due from Owner to Contractor, Contractor will be responsible for paying Owner's costs that would have been covered by the insurance required by this Article 35 unless the reason for the inability to obtain insurance proceeds is the insolvency of the insurer and the insurance in place at the time the covered event occurred met the rating qualifications set for in this Article 35.

35.2.10 Disclaimer

Contractor and each Subcontractor shall have the responsibility to make sure their respective insurance programs fit their particular needs, and it is their responsibility to arrange for and secure any insurance coverage which they deem advisable, whether or not specified herein. Nothing in the Contract shall be construed as limiting in any way the extent to which Contractor may be held responsible for any claims resulting from its performance of the work hereunder. Contractor's obligations to procure insurance are separate and independent of its contractual defense and indemnity obligations. The coverage limits set forth in this Article 35 are minimum requirements and Owner does not represent that the minimum coverage and limits required hereunder will necessarily be adequate to protect Contractor.

35.2.11 Non-Limitation of Insurance Requirements

The insurance coverage provided and limits required hereunder are minimum requirements and are not intended to limit Contractor's indemnification obligations nor do the indemnity obligations limit the rights of the insured parties to the coverage afforded by their insured status. Requirements of specific coverage features or limits contained in this Article 35 are not intended as a limitation on coverage, limits or other requirements, or a waiver of any coverage normally provided by insurance. Specific reference to a given coverage feature is for purposes of clarification only as it pertains to a given issue and is not intended by any party or insured to be all inclusive, or to the exclusion of other coverage, or a waiver of any type. With the exception of any insurance required by a railroad, liability coverage will not be limited to the specific location designated as the Site except that if Contractor arranges project-specific general liability, excess liability, or workers' compensation coverage, limitations of coverage to the Site will be permitted subject to Owner approval and use of the broadest available site-specific endorsements. No liability policy shall



contain any provision that would serve to exclude so-called “third-party-over action” claims, including any exclusion for bodily injury to an employee of the insured or of any Contractor or Subcontractor.

35.2.12 Evidence of Insurance

When required under Article 5.7, Contractor shall deliver to Owner a copy of each policy required to be provided by Contractor under this Article 35, including any corporate policies used to satisfy the terms of this Article 35. If any required policy is not available at the time of Contract execution, Contractor may submit a detailed binder for each required coverage, and/or a copy of the insurer’s quote for each required coverage. The evidence provided must be adequate to allow Owner to determine if all insurance requirements have been met. Contractor shall deliver newly issued policies to Owner within 10 days of receipt. Owner shall have no duty to pay or perform under the Contract until such evidence of insurance, in compliance with all requirements of this Article 35 has been provided. Contractor shall promptly deliver to Owner evidence of insurance with respect to each renewal policy, as necessary to demonstrate the maintenance of the required insurance coverages for the terms specified herein. Such evidence shall be delivered to Owner not less than 15 days prior to the expiration date of any policy, or such shorter period as approved in advance by Owner.

36. PROTECTION OF PERSONS AND PROPERTY

- 36.1** Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the Work.
- 36.2** Contractor shall take all reasonable precautions for the safety of, and shall provide all reasonable protection to prevent damage, injury or loss to:
- (a) All employees involved in the Work and all other persons who may be affected thereby;
 - (b) All the Work and all materials and equipment to be incorporated therein, whether in storage on or off the site or under the care or custody of Subcontractors; and
 - (c) Other property at the Work site(s) or adjacent thereto, including but not limited to trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction.
- 36.3** Contractor shall comply with all Applicable Laws for the safety of persons or property or to protect them from damage, injury or loss. Contractor shall erect and maintain, as required by existing conditions and progress of the Work, all reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards and notifying owners and users of adjacent utilities.
- 36.4** Use or storage of explosive or other hazardous material shall not be permitted without Owner’s written approval. If use or storage of such materials is approved, Contractor shall exercise the utmost care in such use or storage and shall carry on such activities under the supervision of properly qualified personnel.
- 36.5** All damage or loss to any property referred to in this Article caused in whole or in part by Contractor, its Subcontractors, or anyone directly or indirectly employed by any of



them, or by anyone for whose acts any of them may be liable shall be remedied by Contractor.

- 36.6** Contractor shall designate a responsible member of his organization at the site(s) whose duty shall be the prevention of accidents. This person shall be Contractor's Superintendent unless otherwise designated in writing by Contractor to Owner.
- 36.7** Contractor shall not load or permit any part of the Work to be loaded so as to endanger personnel and/or property.
- 36.8** When working in and around Owner property, all personnel employed by Contractor or its Subcontractors shall abide by the applicable safety policies and procedures for the respective Property.
- 36.9** Contractor shall notify Owner to arrange for permission to enter upon Owner and railroad property. 21 days prior notice must be given to Owner for property access when Owner protection personnel are required. Prior to entering Owner's property, Contractor and its Subcontractors may be required to execute Owner's then current Permit to Enter.
- 36.10** Contractor, his employees and Subcontractors shall attend all required safety seminars as directed by Owner.
- 36.11** Contractor must comply with all Owner safety rules and operating rules.

37. OWNER/CONTRACTOR RELATIONSHIP

- 37.1** Owner and Contractor are not employer and employee, and nothing herein shall be construed as creating such relationship between Owner and Contractor.
- 37.2** It is further understood and agreed that, in no event shall Owner be required to make deductions from compensation or report earnings of employees of Contractor under any Social Security Act, or any other state or Federal statute, purporting to levy a tax on payrolls or the compensation of employees; and Contractor hereby agrees to indemnify and save the Indemnified Parties harmless from any and all liability, cost, or expense under such law, growing out of performance under the Contract.

38. LABOR DISPUTES

Whenever an actual or potential labor dispute delays or threatens to delay the timely performance of the Contract, Contractor shall notify Owner immediately and furnish all relevant information. Contractor shall include the substance of this provision in all Subcontracts.

39. DESIGNATION OF REPRESENTATIVES

The Owner Representative and the Contractor Representative are authorized to make decisions and bind Owner and Contractor respectively on matters relating to the Contract. Attachment D to the Signature Document identifies the individuals filling these positions at Contract execution. Such designations may be changed by subsequent writing delivered to the other Party in accordance with Attachment D of the Signature Document. The Parties may also designate other representatives who shall be authorized to investigate and report on matters relating to the Work and negotiate on behalf of each of the Parties.



40. REPRESENTATIONS, WARRANTIES AND COVENANTS

Contractor represents, warrants and covenants for the benefit of Owner as follows:

- (a) Contractor has, and throughout the term of the Contract shall maintain, all required authority, license status (if any), professional ability, skills, and capacity to perform the Work and shall perform such Work in accordance with the requirements contained in the Contract.
- (b) The design for the Work can and shall be prepared in conformity with the Contract, all Applicable Laws, all standards or specifications applicable to the Work and Governmental Approvals.
- (c) The Work can and shall be produced in conformity with the Contract, all Applicable Laws, all standards or specifications applicable to the Work and Governmental Approvals.
- (d) Contractor has evaluated the feasibility of performing the Work within the time specified herein and for the Contract Amount, and has reasonable grounds for believing and does believe that such performance by the applicable Trainset Acceptance deadline is feasible and practicable.
- (e) Contractor has no reason to believe that any Governmental Approval required to be obtained by Contractor will not be granted in due course and thereafter remain in effect so as to enable the Work to proceed in accordance with the Contract.
- (f) Contractor and each of its members, if any, is duly organized and validly existing under the laws of the state in which it was formed, with all requisite power to own its properties and assets and carry on its business as now conducted or proposed to be conducted.
- (g) Contractor and each of its members, if any, is duly qualified to do business and is in good standing in the State and will remain in good standing throughout the term of the Contract and for as long thereafter as any obligations remain outstanding under the Contract.
- (h) The execution, delivery, and performance of the Contract have been duly authorized by all necessary actions of Contractor, and, if applicable, of each member of Contractor, and will not result in a breach or a default under the organizational documents of any such Person or any indenture, loan, credit agreement, or other material agreement or instrument to which any such Person or any Guarantor is a party or by which its properties and assets may be bound or affected.
- (i) Each person executing this Contract on behalf of Contractor has been or will at such time be duly authorized to execute such document on behalf of Contractor.
- (j) The Contract constitutes the legal, valid, and binding obligation of Contractor and, if applicable, of each member of Contractor, enforceable in accordance with its terms.
- (k) Each Guaranty constitutes the legal, valid and binding obligation of the Guarantor, enforceable in accordance with its terms.



- (l) There is no action, suit, proceeding, investigation by a Governmental Person or litigation pending and served on Contractor which challenges Contractor's authority to execute, deliver or perform, or the validity or enforceability of, this Contract, or which challenges Contractor's authority to execute this Contract, and Contractor has disclosed to Owner any pending and unserved threatened action, suit, proceeding, investigation by a Governmental Person or litigation with respect to such matters of which Contractor is aware.
- (m) Contractor is in material compliance with all Applicable Laws that bear on the performance of the Work.
- (n) Neither the execution and delivery by Contractor of the Contract, nor the consummation of the transactions contemplated hereby or thereby, is in conflict with or will result in a default under or a violation of the governing instruments of Contractor or any other agreements or instruments to which it is a party or by which it is bound.

41. CONSEQUENTIAL DAMAGES; LIMITATION OF CONTRACTOR'S LIABILITY

41.1 Consequential Damages

Contractor and Owner will not be liable for punitive damages or special, indirect or incidental damages, whether arising out of breach of the Contract, tort (including negligence) or any other theory of liability, and each party releases the other party from any such liability. The foregoing limitation on liability for consequential damages will not apply to or limit any right of recovery respecting the following:

- (a) Losses (including defense costs) arising out of the Work and covered by the proceeds of insurance carried by or insuring Contractor;
- (b) Losses (including defense costs) of amounts which would have been reimbursed but for the Contractor's failure to carry insurance required to be carried under the Contract;
- (c) Losses (including defense costs) arising out of fraud, criminal conduct, intentional misconduct, recklessness, bad faith or gross negligence;
- (d) Contractor's or Owner's indemnities under the Contract;
- (e) Contractor's obligation to pay liquidated damages in accordance with the Contract;
- (f) Specific amounts owing under the express provisions of the Contract; and
- (g) Losses arising out of releases of hazardous materials by Contractor or Owner.

41.2 Limitation of Contractor's Liability

Contractor's liability to Owner for damages resulting from breach of the Contract shall be limited to an amount equal to 100% of the Contract Amount. However, excluded from this cap will be:

- (a) Losses (including defense costs) arising out of the Work and covered by the proceeds of insurance carried by or insuring Contractor;



- (b) Losses (including defense costs) of amounts which would have been reimbursed but for the Contractor's failure to carry insurance required to be carried under the Contract;
- (c) Any liquidated damages under the Contract paid by Contractor;
- (d) Any type of cost arising from fraud, gross negligence, intentional misconduct or criminal acts of any Contractor-Related Entity;
- (e) All costs reasonably incurred by Owner or any party acting on Owner's behalf (minus the unpaid portion of the Contract Amount) in completing the Work or having the Work completed by another Person; and
- (f) All costs reasonably incurred by Owner or any party acting on Owner's behalf in correcting the Work or having the Work corrected by another Person.

This limitation of liability shall not affect Contractor's obligation to provide insurance hereunder.

42. MISCELLANEOUS

42.1 Governing Law

The Contract shall be governed by and construed in accordance with the laws of the State, without regard to conflict of law principles. Venue for any arbitration action shall lie exclusively in Sacramento County, California.

42.2 Time is of the Essence

All time limits stated in the Contract are of the essence. The time of beginning, rate of progress, and time of completion are essential conditions of the Contract.

42.3 Severability

If any term or provision hereof is or becomes invalid or unenforceable, Contractor and Owner shall in good faith negotiate to replace the invalid or unenforceable term or provision with a term or provision which is valid and enforceable, and which comes as close as possible to expressing the intention of the invalid or unenforceable term or provision. The remaining valid portion of the Contract shall remain binding upon the Parties.

42.4 Trainsets Unfit for Regular Service

In addition to all other remedies under the Contract, if Owner reasonably determines that a particular Trainset is unfit for safe and efficient operation in regular service due to continued failures of the Trainset to perform as required under the Contract, Owner may require Contractor to provide a plan to remedy the problem (for example, through remanufacturing, replacement of systems or provision of a new Trainset). Contractor's plan is subject to Owner's approval. Notwithstanding Contractor's recommendation in the plan, Owner reserves the right, in its reasonable discretion, to require Contractor to provide a new Trainset to replace the Trainset that is unfit for safe and efficient operation in regular service.



42.5 Rights and Remedies

42.5.1 Each of Owner's rights and remedies hereunder shall be cumulative, in addition to, and not a limitation of, any duties, obligations, rights and/or remedies provided at law, in equity, or otherwise. Owner's failure to exercise any of its rights under the Contract, including a failure to enforce any terms, covenants, conditions or other provisions of the Contract, shall not constitute a waiver of any past, present or future right or remedy. No action or failure to act by Owner or any of its representative(s), including the Owner Representative, shall constitute approval of, waiver of, or acquiescence to, a breach by Contractor unless specifically agreed in writing. Waiver by Owner of any breach by Contractor shall not constitute a waiver of any other breach of the same or any other provision of the Contract. Acceptance of any supplies of services, or payment therefor, shall not operate as a waiver of any breach.

42.5.2 All representations, warranties, guaranties, licenses, indemnifications, agreements to hold the Indemnified Parties harmless, and other obligations created by the Contract which by their terms are intended to be fulfilled in whole or in part after termination or completion of the Work or which can, under the particular circumstances at issue, reasonably be fulfilled only after termination or completion of the Work, shall survive termination of the Contract. Contractor shall cause a parallel survival clause to be inserted in all Subcontracts.

42.6 Taxes

The Contract Amount includes all applicable federal, State and local taxes and duties. In the event that an exemption from sales taxes becomes available for the Work, Owner shall have no obligation to reimburse Contractor for any such taxes, and Owner shall be entitled to a decrease in the Contract Amount adjustment under Article 14 equal to the amount saved.

42.7 Return of Data

Contractor, at any time upon the request of Owner, shall immediately return and surrender to Owner all copies of any materials, records, notices, memoranda, recordings, drawings, specifications and mock-ups and any other documents furnished by Owner to Contractor and Subcontractor.

42.8 Conflict of Interest

Contractor hereby affirmatively represents that it shall not have a Conflict of Interest in performing the Work. Contractor agrees not to (a) engage in activities, or (b) initiate or maintain relationships with persons or entities where such activities or relationships create a Conflict of Interest, including relationships with current and former Owner employees and individuals designated by Owner as consultants subject to Owner's Conflict of Interest Code. If Contractor becomes aware of an actual, perceived, or potential Conflict of Interest at any time during its participation in the procurement or performance of the Work, Contractor shall promptly disclose the matter to Owner, as set forth in Owner's Organizational Conflict of Interest Policy.



42.9 Commencement of Statutory Limitation Period

Claims by Contractor shall not be brought after the earliest of (a) Final Payment; (b) one year after the end of the last Trainset Service Period of the last Fleet ordered by Owner under the Contract; or (c) one year after the date of Contractor's last substantial work.

